# THE BRITISH STATE AND THE RULE OF LAW DURING THE TROUBLES IN NORTHERN IRELAND

Ph.D


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Finally, I dedicate the thesis to my mother and father, Margaret and John Garnett.

6 April 2018 Susan Garnett

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## Introduction

1.1. David French examined British counter-insurgency policy between 1945 and 1967 and concluded that although 'the British conducted their counter-insurgency operations according to the rule of law'[1] the legal framework within which they operated gave the British 'such sweeping powers that short of genocide, they could do almost as they pleased'.[2] While David French made these comments in relation to British counter-insurgency operations in various parts of the British Empire, this thesis will examine the extent to which the same could be said of Operation Banner in Northern Ireland. In order to do this the role of Parliament, the courts, and the lawyers will be examined and an assessment made as to the extent to which they constrained the activities of successive British governments and other State actors. In addition, an assessment will be made about the commitment of successive British governments, the civil service and the Security Forces, to promoting the rule of law during the Troubles.[3]

1.2. There are various well-understood devices and mechanisms that governments in democratic States use to limit the reach of law and shield themselves from criticism. These devices and mechanisms include exploiting failings in the legislative framework, using mechanisms that restrict Parliamentary oversight, using discretionary powers to shield members of the Security Forces[4] from prosecution and exploiting any jurisdictional uncertainties that exist in order to frustrate legal challenges.

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[1] David French, *The British Way in Counter-Insurgency, 1945-1967* (Oxford University Press 2011) 29. The emergencies examined by David French occurred in various corners of the British Empire in territories that were not governed democratically. As a consequence, the term the rule of law will inevitably be defined narrowly compared to how the term the rule of law might be used in relation to parts of the United Kingdom in the 1970s and 1980s. See later in this chapter at para 1.17 - 1.38 for a further discussion of the definitions of the rule of law.

[2] ibid 103.

[3] The 'Troubles' is a euphemism used to refer to the most recent period of civil and political unrest in Northern Ireland beginning in the late 1960s.

[4] The Security Forces here include members of the Royal Ulster Constabulary and the British Army, including the Ulster Defence Regiment. The role of the Security Service and the Secret Intelligence Service is not considered in this thesis since the British government did not acknowledge their existence for much of the Troubles. The Security Service was recognised in law in 1989 and the Secret Intelligence Service was recognised in law in l994.

1.3. Examples of these devices and mechanisms would include an over reliance of public inquiries which, some have argued, divert focus away from the justice system and thereby avoid those responsible for abuses being held to account. Another example would be a heavy reliance on covert operations. Covert operations are by their very nature secret, making suspected illegality by covert operatives difficult to prove in court. This is not to suggest that this is the only reason States rely on covert operations because that is clearly not the case. There are many circumstances where covert operations are the only effective method of gathering intelligence. However, an over-reliance on covert operations, in other words, using covert operatives in circumstances where uniformed officers could be deployed with equal effectiveness is a known device to limit the reach of law. Another example would be for governments to implement emergency and anti-terrorism legislation giving sweeping powers to the Security Forces but draft the legislation in such a way as to make those powers as 'judge proof' as possible. In other words, draft the legislation in vague terms making it difficult to pursue abuses through the courts.

1.4. In relation to international law there are equally well–understood mechanisms available to States that allow them to sidestep their treaty obligations. These include, exploiting legal uncertainties, for example by asserting the appropriateness of one legal standard over another. Another mechanism is to use derogations and reservations to allow behaviour by the State that would otherwise be illegal. Another example would be deliberately failing to co-operate with fact-finding attempts by international bodies in order to limit criticism.

1.5. The extent to which successive British governments relied on all or some of these mechanisms and devices will be examined and some assessment made of the response to the use of these devices and mechanisms by Parliament, the courts and the lawyers.

1.6. Northern Ireland has been the subject of many newspaper columns, journal articles and books. Simon Winchester commented that, 'Acre for acre, Ireland has

probably suffered more books than any other country on earth.'[5] While a lot has been written on Northern Ireland, the focus has largely been on counter-insurgency strategies, although in recent years the legal aspects of the conflict have received more attention.[6] However, no one has brought together in one place an overview of the legal framework within which the British government and the Security Forces operated and attempted to assess its effectiveness in limiting the activities of the British authorities during the Troubles.

1.7. Chapter one, whilst acknowledging the complexity of the conflict, aims at nothing more ambitious than to provide a brief summary of the main theories that try to explain the causes of the Troubles and provide the historical context within which the Troubles occurred.

1.8. Chapter two examines the concept of a state of emergency in a democratic State and charts the history of emergency legislation in the United Kingdom in the second half of the twentieth century.[7] This chapter will also examine whether or not the emergency legislation that was implemented to deal with the conflict in Northern Ireland gave sweeping powers to the Security Forces and whether that legislation was drafted in vague terms making it more difficult to pursue alleged abuses through the justice system.

1.9. Chapter three examines the constitutional status of the British Army operating in Northern Ireland. The United Kingdom is ideologically underpinned by the rule of law,[8] legitimacy and the subordination of military forces to government. However, the crisis in Northern Ireland brought into sharp relief the inconsistency between the constitutional status of the military and the widely-held assumptions made in a democratic liberal State about who controls the military. This chapter examines how administrative processes were introduced in order to paper over the cracks between the constitutional status of the British Army and the need for

[5] Simon Winchester, *In Holy Terror: Reporting the Ulster Troubles* (Faber and Faber Ltd 1974) 13.
[6] See the work of Brice Dickson, Colm Campbell, Sean Doran, Fionnuala Ni Aolain, Stephen Livingston, Tom Hadden, David Bonner, Paddy Hillyard, Kevin Boyle, Angela Hegarty, Patricia Lundy, Bill Rolston, Kieran McEvoy Michael O' Boyle, and Ita Connolly to name but a few. The works of all these authors are referred to in this thesis.
[7] Non-democratic nation States also experience emergencies but these are not examined here.
[8] The definition of the term rule of law is discussed at para 1.17-1.38.

ministerial control of the military. This chapter concludes by examining the Falls Road Curfew in July 1970. The curfew lasted for just 35 hours and was an isolated incident. However, it highlighted the gulf between the constitutional framework on the one hand, and the administrative norms on the other.

1.10. Chapter four examines the use of the ordinary criminal law to govern the use of force, including lethal force, by members of the Security Forces on duty in Northern Ireland. In other words, the focus of this chapter is the use of ordinary law to investigate, charge and prosecute allegations of unjustifiable force by individual members of the Security Forces. The aim is to assess whether or not the ordinary law provided an effective constraint on the actions of individual soldiers. There will also be some assessment of whether normal processes were 'bent' in order to avoid charges being brought and/or to secure acquittals or lighter sentences for those members of the Security Forces accused of offences including murder. This chapter also examines the role of the coroner during the Troubles.

1.11. Chapter five examines the legal basis of undercover operations undertaken by the police and British Army in Northern Ireland. It examines the British government's approach to agent recruitment, handling and running, and examines the importance of covert operations in the fight against terrorism. This chapter also looks at the allegations that the British authorities colluded with paramilitary groups, facilitating and directing crimes including murder. Any truth to such allegations would undermine claims by the British authorities that throughout the Troubles they were committed to operating within the law.

1.12. Chapter six considers Operation Folklore, the contingency plan drawn up in the 1970s by officials from various departments across Whitehall and senior military officers to deal with the situation in Northern Ireland should the Troubles become more violent but fall short of becoming a civil war. Specifically, the plans shed light on the attitudes of officials in Whitehall and senior officers in the British Army to operating within the law. Although the government files released so far relating to Operation Folklore do not reveal that these plans ever received ministerial approval, the plans are nevertheless interesting because of what they reveal about British Army and official thinking at the time. This is particularly so

in relation to what the military and officials in Whitehall were willing to contemplate in terms of civilian casualties. This chapter tries to assess whether the plans drawn up by the Security Forces and Whitehall officials reflect a determination to operate within the law, or whether they tended to sideline the rule of law and focus instead on winning the 'war' and restoring order at all costs. If the plans tended to ignore the rule of law, was this accompanied by a recognition that the perception of the rule of law would nevertheless need to be maintained, or was the plan to ignore the rule of law and move towards a system of martial law giving the military autonomy to deal with the violence?

1.13. Chapter seven examines the legality of two of the policies introduced by the British government in the early 1970s, namely internment and interrogations in-depth. This chapter will also look at the use of public inquiries to deal with allegations of abuse in relation to these two policies. It will explore whether setting up public inquiries should be understood as a device used by the British government to both shield itself from criticism and frustrate attempts to bring State actors to account.

1.14. Chapter eight provides an analysis of the role of the British government in determining the legislative framework within which the conflict in Northern Ireland came to be viewed. It also examines the role of the courts, both domestic and international, in holding successive British governments to account in relation to the policies of internment and in-depth interrogations. The role of lawyers is also examined and the extent to which they used their professional status and expertise to highlight wrongdoing by the British government and bring allegations of abuse before the courts. The chapter also examines the British government's commitment to the rule of law by looking at what was said behind closed doors by senior members of the British government at the time.

1.15. The conclusion will attempt to look at the overall picture and make some assessment about the extent to which government Ministers, the Security Forces at an organisational level and individual soldiers were able to act with impunity during the Troubles.

## Definitions

1.16. Various familiar terms, like the rule of law, terrorism, martial law and civil war are used throughout this thesis. Yet despite their familiarity, there are no universally accepted definitions for these terms. It therefore seems sensible to set out how these terms are being used in this thesis.

### Rule of Law

1.17. Even a quick glance at the literature reveals that there is little agreement on the definition of the 'rule of law'. Despite this lack of clarity, it remains pervasive as an ideal and 'almost universally advocated'.[9] In fact, it has been suggested that 'no other single political ideal has ever achieved such global endorsement'. [10] It has been glorified as an 'unqualified human good',[11] 'the motherhood and apple pie of development economics',[12] 'that potent fiction',[13] 'a shibboleth of English politics'[14] and has been said to have 'amorphous and talismanic qualities'.[15] In addition, 'there appears to be widespread agreement, traversing all fault lines, on one point and one point alone: the rule of law is good for everyone'.[16] Joseph Raz observed that there is a 'tendency to use the rule of law as a shorthand description of the positive aspects of any given system'.[17] It seems to be viewed as not only a good in itself because it is central to a just society, but also because it causes other good things to happen, namely economic growth.[18]

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[9] Amichai Magen, 'The Rule of Law and Its Promotion Abroad: Three Problems of Scope' (2009) 45(1) Stanford Journal of International Law 51, 55. The degree to which the rule of law is universally desirable can be overstated. In the past Marxist and Fascist regimes rejected the rule of law as a capitalist concept. Radical Islamic groups like Al-Qaeda also reject the rule of law believing that it abrogates Allah's will on earth.
[10] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 3.
[11] E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975) 266.
[12] 'Economics and the Rule of Law: Order in the Jungle' *The Economist* (London, 13 March 2008).
[13] Edmund Morgan, 'The Great Political Fiction' (1978) 25(3) New York Review of Books 13.
[14] John Brewer, John Styles, 'Popular attitudes to the law in the eighteenth century' in Mike Fitzgerald, Gregor McLennan, Jennie Pawson (eds), *Crime and Society Readings in History and Theory* (Open University Press 1981) 24.
[15] Nasser Hussain, *Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 8.
[16] Tamanaha (n10)1.
[17] Joseph Raz, *The Authority of Law; Essays on Law and Morality* (Oxford University Press 1979) 212.
[18] Economics and the Rule of Law (n12).

1.18. E. P. Thompson's analysis of England during the eighteenth century began with the assertion that almost all Englishmen, rich or poor considered the rule of law to be their common inheritance.[19] He later wrote referring to the rule of law that, 'It seems to me a legacy as substantial as any handed down from the struggles of the seventeenth century and eighteenth century; and a true and important cultural achievement.'[20]

1.19. Despite the fact that the rule of law is generally understood to promote and safeguard values that are intrinsically good it is unfortunately 'afflicted by an extraordinary divergence of understandings'.[21] So much so, that Judith Shklar has claimed that this lack of agreement on the definition of the rule of law has rendered the concept meaningless by 'ideological abuse and general over-use'.[22] Of course its attraction as an ideal may stem from this imprecision, 'which allows each of us to project our own sense of the ideal government on the phrase 'rule of law''.[23]

1.20. Conceptions of the rule of law can be divided into two general types: 'thin' and 'thick'.[24] The 'thin' concept of the rule of law sometimes referred to as 'formal',[25] 'rule-book' [26] or 'negative'[27] conceptions of the rule of law, divorces law from politics. Joseph Raz provides an example of a 'thin' definition of the rule of law. He states that 'the rule of law means literally what it says: the rule of laws. Taken

[19] E P Thompson, *The Making of the English Working Class* (Victor Gollancz 1963) 83.
[20] Thompson (n11) 265.
[21] Magen (n9) 55.
[22] Judith Shklar, 'Political Theory and the Rule of Law' in Allan Hutchinson, Patrick Monohan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.
[23] Daniel Rodriguez, Mathew McCubbins, Barry Weingast, 'The Rule of Law Unplugged' (2009-2010) 59 Emory Law Journal 1455, 1458.
[24] Randall Peerenboom, 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating the Rule of Law in China' (2002) 23(3) Michigan Journal of International Law 471, 473.
[25] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467.
[26] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-13.
[27] Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier, Adam Czarnota (eds), *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Dartmouth Publishing Company Ltd 1999) 21-38.

in its broadest sense this means that people should obey the law and be ruled by it'.[28]

1.21. The rule of law in this 'thin' sense focuses on the minimal conditions necessary to retain authority. The 'thin' notions of the rule of law when unpicked and disaggregated into their component parts stress procedural rules and focus on due processes. The rule of law in this 'thin' sense is not about the content of the laws nor is it about the political system that produces the laws. Instead the focus is on whether the laws are prospective, accessible, clear and consistent with each other. What is important is that the laws provide guidance, and that guidance is relatively stable over time and the courts are reasonably efficient and accessible. Slightly 'thicker' versions of the term the rule of law have linked the rule of law with order and the requirement that on the whole people obey the law and are ruled by it. In this slightly thicker sense, the rule of law has also been tethered to the idea of equality under law and before the courts and linked to an independent judiciary that has authority to interpret the laws.

1.22. Understanding the rule of law in this 'thin' or 'thinner' sense can mean, as Joseph Raz has pointed out that:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.[29]

1.23. One rationale for restricting the rule of law to the 'thin' sense of the word is that by doing so it gives the concept an independent function. In other words, although most people would agree that laws should be just and that laws should protect individual rights, if the concept of the rule of law is taken to encompass only 'good' laws then the term absorbs the idea of a just society. As a consequence, laws will be judged as conforming with the rule of law when in fact they are really being judged as reflecting a particular political philosophy. Debates about

[28] Raz (n17) 212.
[29] Raz (n17) 211.

what constitutes a just society are important but that debate need not be yoked to the concept of the rule of law. The content of the law is a matter of substantive justice, which is 'an independent ideal, in no sense part of the ideal of the rule of law'.[30]

1.24. However, this 'thin' concept of the rule of law has evolved into a 'thicker', more positive liberal-democratic conception. 'Thicker' versions of the rule of law include a 'thin' version of the rule of law with a large set of rights and principles bolted on top. These rights and principles tend to include 'democracy, human freedom, equality, justice, economic well-being and national identity'.[31] The rule of law is the foundation for these rights that are then used to evaluate the quality of the laws. In order to conform to the rule of law in this 'thick' sense the laws themselves must reflect the principles of justice and moral and political rights. These principles must be protected by the law and must be capable of being enforced through the courts. However, the problem here is that there is no consensus about which rights and principles are to be included.

1.25. A 'thick' conception of the rule of law makes the assumption that the institutions making up the justice system, the lawyers, the courts and the police will act fairly and that the judges are impartial and independent from other State apparatus. Others have gone further and suggested that focusing on the justice system because it is the key institution responsible for implementing the rule of law is a mistake. Instead, more importance should be placed on the stability of the wider political system in which the legal institutions are embedded.[32]

1.26. The 'thick' or positive conception of the rule of law tethers the rule of law to both morality and institutional processes. The 'thick' definition of the rule of law treats the rule of law as the core of a just society. The law protects political and civil liberties and provides procedural guarantees. Rachel Kleinfeld provides an example of a thick conception of the rule of law in which the term 'rule of law' is used to convey five different meanings that are distinct but rarely distinguished.

[30] Dworkin (n26) 11.
[31] Rodriguez, McCubbins, Weingast (n23) 1457.
[32] ibid 1469.

The five meanings are (1) government bound by law; (2) equality before the law; (3) law and order; (4) predictable, efficient justice, and (5) public power respectful of human rights.[33] International bodies have tended to interpret the rule of law in this thick sense. For example, the Council of Europe and the United Nations (UN) have interpreted the rule of law in a 'thick' rather than 'thin' sense.

1.27. The Secretary General of the Council of Europe has stated that the rule of law depends on five fundamental building blocks. These are an independent and efficient legal system, freedom of expression, freedom of assembly and freedom of association, functioning democratic institutions and inclusive societies.[34] This concept of the rule of law first appeared in the European Court of Human Rights case law in the judgment of *Golder v United Kingdom*.[35] The European Court of Human Rights chose to interpret Article 6(1) (right to a fair trial) to mean the right of access to a court. This wide interpretation was based, according to Davit Melkonyan, 'on the reference to the rule of law[36] made in the Preamble to the Convention'.[37] Following on from that judgment the rule of law has since become 'a guiding principle for the Court'[38] and the rule of law has been defined by the Court as 'one of the fundamental principles of a democratic society'.[39]

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[33] Rachel Kleinfeld, 'Competing Definitions of the Rule of Law' (2005) 55(1) Carnegie Endowment, Rule of Law Series 1, 3.

[34] Council of Europe, 2016 Report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe (Council of Europe 2016) <https://edoc.coe.int/en/an-overview/6926-pdf-state-of-democracy-right-and-the-rule-of-law.html> accessed 30 November 2017.

[35] *Golder v United Kingdom* (1975) 1 EHRR 524 para 34.

[36] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 6 March 2018]
Preamble to the Convention:
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

[37] Davit Melkonyan, 'Concept of the Rule of Law in the Case-Law of the European Court of Human Rights' (2014) Yerevan State University Press 339.

[38] ibid.

[39] *Klass v Germany*, 25 June 1996, § 55 quoted in Melkonyan (n37) 339.

1.28. The United Nations (UN) Secretary General defined the rule of law in the following way:

> A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[40]

1.29. Amichai Magen has identified eight attributes that are fundamental to the conceptualisation of the rule of law in a liberal democratic State. They are as follows:

> (1) There is a constitutional order - a legal hierarchy in which the relationship between legal rules are themselves legally ruled, and where all actors are permanently subject to rules that govern their conduct;
>
> (2) The constitutional order (whether fully or partially codified) is supreme and is interpreted by a constitutional court; the state apparatus is effective - legislative, executive and justice system institutions (courts, prosecutors, police, detention centres and jails) possess and exercise effective institutional and administrative capacity;
>
> (3) No one is above the law - the law is equally applied across the country's territory, to everyone, including government and state agents;
>
> (4) Illegality and corruption are discouraged, detected and sanctioned across all branches of the government and state administration;
>
> (5) Fundamental political and civil rights are guaranteed and upheld equally (so

[40] UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: report of the Secretary-General, 23 August 2004,* S/2004/616 1, at hhtp://www.refworld.org/dpcid/45069c434.html [accessed on 3 October 2017].

that they also apply to disadvantaged groups, including women and minorities);

(6) All security forces are subservient to civilian government, the police force is professional, efficient, and respectful of individuals' legally protected rights, and treatment of detainees and prisoners is humane;

(7) The judiciary is independent from undue influence from executive, legislative and special interests, and;

(8) Access to justice in criminal, civil, and public matters is fair and reasonably expeditious.[41]

1.30. In this thesis, the concept of the rule of law being used is a 'thick' rather than a 'thin' sense but not so 'thick' as to include any notion of economic prosperity. The thesis will look at the extent to which the rule of law in a thick 'ish' sense was undermined during the Troubles and rely to some extent on the sort of conceptualisation of the rule of law described by Magen.

1.31. It seems appropriate to use a 'thick' rather than 'thin' version of the rule of law as a yardstick against which to measure the activities of the British during the Troubles because using a 'thicker' version of the rule of law allows some assessment of the impact of the emergency measures on civil and political rights. In addition, and perhaps more importantly, it allows the reasonableness of the emergency measures introduced by the British to be judged against the level of perceived threat.

**Martial Law**

1.32. There appears to be competing theories about the legal basis and therefore the status of martial law in Britain. This lack of agreement perhaps explains the lack of clarity regarding the scope of the powers involved.

1.33. One approach, taken by A.V. Dicey, in what has been described as the most famous work on the English constitution,[42] is to define martial law in its proper sense, as 'the suspension of ordinary law, and the temporary government of a

[41] Magen (n9) 62.
[42] David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59(1) The University of Toronto Law Journal 1, 4.

country or parts of it, by military tribunals'.[43] This concept of martial law echoes Lord Wellington's sentiments in 1851 when he pronounced in relation to martial law in Ceylon that it represents the 'will of the General who commands the army'.[44] However, Dicey claimed that this understanding of martial law 'was not known to the law of England'.[45] Instead Dicey understood martial law as a system of military rule which temporarily replaces the established system in times of national crises but which is subject to constitutional constraints.[46] On this understanding of the term martial law, authority would never pass entirely to the military.

1.34. British government officials have also grappled with the meaning of the term martial law. In 1937, the Foreign Office sent a telegram to Colonel Mackereth stationed in Damascus explaining martial law in the following terms:

> In English law, it implies the replacement in part or the whole of the country of the civil power in every respect of government, administrative as well as judicial, by the military, acting not under a specific legal provision but on the fundamental principle giving military commanders the power and the duty to take charge when all the means provided for government under existing law have broken down.[47]

1.35. In 1972 Whitehall officials sought confirmation from government lawyers on the meaning of the term martial law.[48] Government officials were making these inquiries because they were planning Operation Folklore in Northern Ireland. Operation Folklore was the contingency plan drawn up by officials and senior military officers to deal with the violence in Northern Ireland if it ever reached a point where the British Army was close to losing control. The response from

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[43] A Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1971) 287-8.
[44] Hansard, cxv 880 (1 April 1851).
[45] Dicey (n43) 287-8.
[46] Dicey (n43) 283-4.
[47] The National Archives (TNA): Public Records Office (PRO) WO 32/9618 Telegram from the Foreign Office to Colonel Mackereth in (October 26, 1937).
[48] The National Archive (TNA): Public Records Office (PRO) CAB 164/110 Northern Ireland Contingency Planning 1972 Operation Folklore Folio 16 [TNA (PRO) CAB 164/110 Operation Folklore 1972 Folio 16].

government lawyers explained that properly understood martial law means 'the suspension of ordinary law and the government of any part of the country by military tribunal of the army'. [49] On this understanding, martial law can only exist in a state of war, when the laws of war will apply. In a state of war then the civil courts lose any right to interfere in the actions of the military. Martial law is the will of the commanding officer limited only by the laws and customs of war. However, this concept of martial law cannot be applied to internal conflicts where the civil government is still operating, despite what might be widespread disorder. In this situation, the military is acting to regain control and establish order. It is acting as military aid to the civil power.

1.36. The legal advice goes on to explain that 'In time of rebellion, or expectation thereof, exceptional powers are often exercised by the Crown, acting usually through its military forces, for the suppression of hostilities or the maintenance of order.'[50] The advice explained that the expression martial law is sometimes used in this sense to mean 'the common law right of the Crown to repel force by force in the case of insurrection or riot and to take such exceptional measures as may be necessary for the purpose of restoring order'.[51]

1.37. Martial law in this second sense is generally announced by proclamation but this is not a legal requirement. A proclamation of martial law does not suspend the ordinary law. Instead it operates as a warning that the government is about to resort to such forcible measures as are necessary to suppress an insurrection. The legal advice explains that the usual device used to preclude any questions being raised afterwards about the legality of the measures taken to suppress an insurrection or rebellion is an act of indemnity that would at the very least cover actions taken in good faith. If there was no act of indemnity then the ordinary courts could enquire and decide whether the circumstances justified the action taken to suppress the violence.

[49] ibid.
[50] ibid.
[51] ibid.

1.38. The details of Operation Folklore will be examined in chapter six and references by officials to martial law should be interpreted in this second sense rather than being the suspension of ordinary law.

**Terrorism**

1.39. UN Resolution 1566 defined terrorism in 2004 as:

> …criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature …[52]

1.40. However, the Supreme Court in *R v Gul* found that there is no internationally agreed definition of terrorism.[53] Despite the fact that there may be no universally agreed definition of terrorism, there is perhaps a common understanding about the essence of terrorism. The central ingredient of the phenomenon is the use of violence for political ends by private individuals. For example, Simon Anglim treats terrorism as 'the use of violence in order to influence the enemy's political decision-making through instilling an on-going sense of fear and insecurity that might cease if the terrorist's demands were met'.[54] Peter Neumann defined terrorism as 'the deliberate creation of fear usually through the use or threat of use of symbolic acts of violence in order to influence the political behaviour of the target group'.[55] Richard Baxter defined terrorism as:

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[52] UN Security Council, *Security Council resolution 1566 (2004) [concerning threats to international peace and security caused by terrorism]*, 8 October 2004, S/RES/1566 (2004), available at: http://www.refworld.org/docid/42c39b6d4.html [accessed 1 December 2017].
[53] *R v Gul* (Mohammed) [2013] UKSC 64, 23.
[54] Simon Anglim, 'Orde Wingate and the Special Night Squads: A Feasible Policy for Counter-Terrorism?' (2007) 28(1) Contemporary Security Policy 28.
[55] Peter Neumann, M L R Smith, *The Strategy of Terrorism: How It Works and Why It Fails* (Routledge, Taylor and Francis 2008) 8.

> …the deliberate killing, wounding, or deprivation of the liberty of innocent civilians for political purposes in time of armed conflict (but not incident to the conflict), whether accomplished by members of regularly constituted armed forces or persons not recognised as belligerents.[56]

1.41. Terrorism is defined in the Northern Ireland (Emergency Provisions) Act 1978 and also in the Prevention of Terrorism (Temporary Provisions) Act 1976. The first piece of legislation applies only to Northern Ireland and the second piece of legislation applies to the whole of the United Kingdom. In both pieces of legislation terrorism is defined as 'the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear'.[57]

1.42. The term has evolved since the 1970s and section 1 of the Terrorism Act 2000 now defines terrorism to mean the use or threat of action, inside or outside the United Kingdom designed to influence a government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial, or ideological cause.

1.43. Action will fall within the meaning of the Act if it –

(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to public health, or safety of the public, or a section of the public, or
(e) designed to seriously interfere with or seriously disrupt an electronic system.[58]

[56] Richard Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974) 7(3) Akron Law Review 380.
[57] Northern Ireland (Emergency Provisions) Act 1978 s 31(1) and the Prevention of Terrorism (Temporary Provisions) Act 1976 s 14(1).
[58] The Terrorism Act 2000 s1.

1.44. Commenting on this definition Leslie Green noted that:

> At first blush this definition would appear wide enough to include any act of violence, particularly if a fire arm was used, committed anywhere in the world by any person regardless of nationality, especially if it can be argued that it is intended to intimidate, as most acts of violence are.[59]

1.45. David Anderson in his review of the terrorism legislation suggested that the 'definition was remarkably broad - absurdly so in some cases'[60] and was so wide that it would catch certain 'activities carried out by UK forces engaged in conflicts overseas'.[61]

1.46. The problem is that if the definition is too broad then it will fail to correctly determine the scope of the term. This in turn leaves public officials to determine whether an act is to be classified as terrorism or not, leading to a lack of certainty which undermines the rule of law. Greene makes the point that giving public officials discretion 'creates "legal black holes" where the discretion of the decision maker cannot be questioned, leaving the definition of terrorism only as a facilitator of power rather than a constraint upon it'.[62] In other words, a wide definition leaves the assessment of whether an act is to be classified as terrorism to the discretion of officials which Greene states is 'in practical terms … no different than if terrorism is not defined at all'.[63] In relation to this thesis it is not important which definition is used since the Irish Republican Army (IRA) and all its splinter groups[64] fit within all of these definitions.[65]

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[59] Leslie Green, 'The Relevance of Humanitarian Law to Terrorism and Terrorists' in John Carey, William Dunlap, Robert Pritchard (eds), *International Humanitarian Law: Prospects* (Transnational Publishers Inc. 2006) 8.
[60] David Anderson, Terrorism, Prevention and Detection Measures in 2012 First Report of 2013 (TPIMS 2012) 4.3 at <http://terrorismlegislationreviewer.independent.gov.uk/publications/first-report--tpims?=Binary> accessed 5 October 2017.
[61] ibid 4.4.
[62] Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: R v Gul' (2014) 77(5) The Modern Law Review 780, 792.
[63] ibid 791.
[64] Examples of splinter groups and groups with similar aims would be the Provisional Irish Republican Army (PIRA), the Real Irish Republican Army, the Continuity Irish Republican Army, the Official Irish Republican Army and the Irish National Liberation Army.

1.47. It may be very obvious but it is worth making the point that the IRA and its splinter groups did not view themselves as terrorists. Instead, they regarded themselves as being part of a national liberation movement fighting a war on behalf of their 'people' against an illegitimate British government.[66] The British government condemned the IRA as terrorists but at the same time the IRA accused the British government of resorting to terrorist activities to suppress their legitimate claims. The use of the term terrorist in these circumstances 'is often nothing more than an emotional reaction to the violence'.[67] Richard Baxter suggests that 'we have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise, it is ambiguous, and above all, it serves no operative legal purpose'.[68]

1.48. The fact that one of the most prominent figures associated with the IRA during the recent Troubles, Martin McGuiness was imprisoned as a terrorist during the early years of the conflict but has subsequently been praised as eminent statesman and 'an honourable man' for his part in the peace process by former American president Bill Clinton, serves to blur the lines between freedom fighters and terrorists.[69] The lines are further blurred because this is not an isolated example. It does seem to be the case that 'not a few of today's presidents and prime ministers were yesterday's guerillas'.[70] Hence, the cliché that 'one man's terrorist is another man's freedom fighter'.[71] The implication is that there is no moral distinction between freedom fighters and terrorists when they use violence. Sebastian

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[65] The largest Protestant paramilitary organisation, the Ulster Defence Association was not a proscribed organisation until August 1992. Nevertheless, the activities of the Ulster Defence Association would fall within the definitions of terrorism provided here.
[66] Ciaran McCauley, 'McGuiness was a freedom fighter, not a terrorist' BBC News 23 March 2017 <http://www.bbc.co.uk/news/uk-Northern-Ireland-39368451> accessed 24 March 2017. Gerry Adams spoke at the funeral of Martin McGuiness and stated that 'Martin McGuiness was not a terrorist. Martin McGuiness was a freedom fighter.'
[67] Green (n59) 3.
[68] Baxter (n56) 380.
[69] Henry McDonald, 'Bill Clinton urges leaders at Martin McGuiness funeral to finish his work' *The Guardian* (London, 23 March 2017) <https://www.theguardian.com/politics/2017/mar/23/martin-mcguinness-funeral-former-foes-come-together-in-tribute-to-ex-ira-leader >accessed on 24 March 2017
[70] Baxter (n56) 380.
[71] Sebastian Schnelle, 'Abdullah Azzam, Ideologue of Jihad: Freedom Fighter or Terrorist?' (2012) 54(4) Journal of Church and State 625.

Schnelle effectively summed up this point of view by stating that 'The only difference between the two is one of perspective, or more cynically, the difference is a matter of military or political propaganda success.'[72]

1.49. Walter Laqueur has lamented the fact that the differences between different forms of violence are often misunderstood. He claims that, 'some Western experts, and especially the media have great difficulty accepting the basic differences among various forms of violence'.[73] He argues that various terms including, gunmen, freedom fighters, partisans, urban guerrillas, terrorists, insurgents and commandos are used interchangeably.[74] He believes that some of this confusion may be genuine but that frequently it has a political motive.

1.50. Freedom fighters are often understood to be combating social and national injustice, and in these circumstances 'violent resistance to authority is often justified'.[75] Consequently, 'freedom fighters have a positive public relations image'.[76] Terrorists, however, do not. It has been argued that the crucial difference between the two is their choice of targets.[77] Freedom fighters strike at military and strategic targets, and although there is often collateral damage in terms of civilians, civilians are never the intended target. Terrorists, on the other hand, intend to harm civilians and attacks on civilians provide the means by which the terrorist hopes to effect change. 'It is the political motivation and the targeting of noncombatants that distinguishes terrorist violence from other forms of violence.'[78] This has led to the claim that an 'essential feature of modern terrorism is the severing of the link between the target of violence and the reason for violence'.[79]

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[72] ibid.
[73] Walter Laqueur, 'Reflections on Terrorism' (1986) 65 Foreign Affairs 86, 90.
[74] ibid.
[75] Louise Goldie, 'Profile of a Terrorist: Distinguishing Freedom Fighters from Terrorists' (1987) 14 Syracuse Journal of International Law and Commerce 125, 127.
[76] Laqueur (n73) 90.
[77] Goldie (n75) 127.
[78] Alex Bellamy, *Fighting Terror: Ethical Dilemmas* (Zed Books 2006) 38-41.
[79] How to tell a Terrorist, 300 The Economist 9 (July 26 1986) quoted in Goldie (n74) 127.

**Civil War**

1.51. Prior to 1949 traditional customary international law distinguished between three categories of internal violence, where the violence was used as a tool to challenge the authority of the State. On a scale of increasing intensity these categories were rebellion, insurgency and belligerency.[80] 'The rights and obligations of parties to a conflict were first decided by the status of the factions in a conflict.'[81] The status of the parties involved in the fighting was in turn dependent of the status of the fight, whether it is a rebellion, insurgency or belligerency.

**Rebellion**

1.52. Rebellion involves sporadic outbursts of violence challenging the legitimacy of the State. Rebels are considered to be criminals and as such fall under the exclusive jurisdiction of domestic law. This is the case whether or not the rebellion has been recognised by a third State. If a third State did provide assistance to the rebels this would amount to unlawful interference with State sovereignty under international law. The level of violence required in order to pass the threshold necessary to be considered a rebellion is undefined. Richard Falk suggests that rebellion incorporates many 'instances of minor conflict within a State including violent single-issue protests'.[82]

**Insurgency**

1.53. Insurgency is a more serious challenge to the State's authority and involves more violence. In an insurgency 'the rebel faction will be sufficiently organised to mount a credible threat to the government'.[83] However, the criteria for the recognition of an insurgency are not agreed.[84] Heather Wilson notes:

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[80] Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press 1988) 24.
[81] Richard Falk, 'Janus Tormented: The International Law of Internal Law' in James Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press 1964) 185, 197.
[82] ibid 198.
[83] Lindsay Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' (1998) 47(2) International and Comparative Law Quarterly 337, 338.
[84] Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 619.

> There are no requirements for the degree of intensity of the violence, the extent of control of territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with humanitarian principles which would indicate recognition of insurgency is appropriate.[85]

1.54. 'Foreign states will be forced to acknowledge the factual situation to protect their own interests.'[86] The necessity for outside powers to enter into agreements with insurgents in order to protect their nationals, their commercial interests and sea-borne trade, has led Starke to suggest that these agreements are the only criteria for a conflict to be the categorised as an insurgency.[87] Heather Wilson also suggests 'that insurgents have characteristics between rebels and belligerents which require that other States have some form of limited relations with them'.[88]

1.55. There are two competing theories regarding the legal status of insurgents. Some academics, for example Morris Greenspan,[89] argue that the categorisation as an insurgency brings that group firmly into international law. Others, for example, Eric Castren,[90] argue that conferring the status of insurgents on a group does not provide that group with any protection from international law. In other words, insurgents are exclusively subject to the criminal law of the State.

**Belligerency**

1.56. Belligerency is the most serious type of challenge to the States authority recognised by traditional customary international law. Recognition of belligerency formalises the rights and duties on all parties to the war. In other words, the recognition of belligerency triggers the use of international law on non-state actors and recognises that non-state actors can and do wage wars.[91] Historically, recognition of both insurgency[92] and belligerency has been rare.[93] Recognition of

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[85] Wilson (n80) 25.
[86] Moir (n83) 338.
[87] J Starke, *An Introduction to International Law* (5th edn Butterworth 1963) 145.
[88] Wilson (n80) 25.
[89] Greenspan (n84) 620.
[90] Eric Castren, *Civil War* (Suomalainen Tiedenkatemia 1966) 97 quoted in Wilson (n79) 25.
[91] Wilson (n80) 25.
[92] Dietrich Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' [1979] 163 Recueil des Cours de l' Academie de Droit International 119, 146.

belligerency, which made the laws of war applicable, was the responsibility of the State and there was no obligation on the State to recognise a state of belligerency within its territory, even when various factual criteria were met. Recognising belligerency was so rare that one commentator has suggested that 'recognition of this status has lost all practical significance'[94] and another has suggested that any 'discussion of what rights and duties are applicable under traditional international law when belligerency of a national liberation movement is recognised is highly theoretical and devoid of practice in support of theory'.[95] What this meant was that internal conflicts, on the whole, fell outside the application of international law.

1.57. However, after the Second World War the situation in relation to internal wars changed because of the adoption of the four Geneva Conventions of 1949.[96] In these Conventions armed conflicts were classified as either international armed conflicts or non-international armed conflicts. Article 3, common to all four of the 1949 Geneva Conventions, covered situations of non-international armed conflicts (NIAC) and established fundamental rules that permitted no derogation. Common Article 3 has been described as a 'milestone in the development of the law of war'.[97]

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[93] Wilson (n80) 27.
[94] Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (Thames and Hudson 1972) 171.
[95] Wilson (n80) 37.
[96](1) International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), 12 August 1949, 75 UNTS 31 at http://www.refworld.org.docid/3ae6b3694.html [accessed 4 October 2017] [First Geneva Convention]
(2) International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85, at http://www.refworld.org/docid/3ae6b37927.html [accessed on 4 October 2017] [Second Geneva Convention]
(3) International Committee of the Red Cross (ICRC), *Geneva Convention relative to the Treatment of Prisoners of* War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, at http://www.refworld.org/docid/3ae6b36c8.html [accessed 4 October 2017] [Third Geneva Convention]
(4) International Committee of the Red Cross (ICRC), *Geneva Convention relative to the protection of Civilian Persons in Time of War* (Forth Geneva Convention), 12 August 1949, 75 UNTS 287, at http://www.refworld.org/docid/3ae6b36d2.html [accessed 4 October 2017] [Forth Geneva Convention]
[97] Wilson (n80) 43.

1.58. Common Article 3 provides that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions,
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples…
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

> The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[98]

1.59. The difficulty with Article 3 is identifying when a violent situation has passed from being a situation that ought rightly to be dealt with by national law enforcement agencies to one that ought rightly to be classified as a non-international armed conflict.

1.60. The problem arises because Article 3 fails to provide either a definition of the levels of violence that do not amount to an internal armed conflict or a definition of the levels of violence that do amount to an internal armed conflict. Levels of violence that do not amount to an internal armed conflict are referred to as 'internal disturbances and tensions' and these do not trigger the protection of Article 3. The concept of internal disturbances is not defined but instead illustrated by way of examples.[99] These include situations such as riots, which develop from demonstrations where there is no concerted plan from the outset. They also include isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups.

1.61. Dietrich Schindler examined the distinction between situations of non-international armed conflict and 'internal disturbances and tensions' and identified four conditions for determining the existence of an armed conflict. He stated that:

> In the first place, hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its own armed forces against insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be collective in character, that is,

[98] First Geneva Convention (n96) Art 3.
[99] 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (1987) 27 International Review of the Red Cross 130 para 4341.

they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under responsible command and be capable of meeting humanitarian requirements. Accordingly, the conflict may show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.[100]

1.62. In addition, the commentary to the Geneva Conventions of 12 August 1949 states:

> … that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities … conflicts, in short, which are in many respects similar to an international war, but which take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of national territory and there is some sort of front.[101]

1.63. To summarise, it would appear that the level of violence that will trigger Article 3 protection is measured against firstly, the sustained and concerted nature of violence, secondly, the degree of organisation of the terrorist group and thirdly, the control of territory.[102]

1.64. The United Kingdom denied that the Troubles in Northern Ireland amounted to a non-international armed conflict and therefore maintained that Article 3 did not apply. This is despite the fact that the Northern Ireland Prime Minister, Brian Faulkner, said on the 9 August 1971, the day internment was implemented, 'We are, quite simply, at war with the terrorists'[103] and in 1971 Reginald Maudling, the then British Home Secretary, echoed this belief stating that 'the British

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[100] Schindler (n92) 147.

[101] International Committee of the Red Cross (ICRC), *Commentary, IV Geneva Conventions of 12 August 1949, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (J Pictet edn 1958) 36 <https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf> accessed 4 October 2017.

[102] *Prosecutor v. Dusko Tadic (Judgement in Sentencing Appeals)*, IT-94-1-A and IT-94-1-Abis, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 January 2000, available at: <http://www.refworld.org/cases,ICTY,40277e944.html> [accessed 10 September 2018]

[103] BBC News 'NI activates internment law' 9 August 1971 http://news.bbc.co.uk/onthisday/hi/dates/stories/august/9/newsid_4071000/4071849.stm accessed 17 March 2017.

government was at war with the IRA'.[104]

1.65. The British government's position was, however, controversial. Colm Campbell claims that:

> The Northern Ireland conflict is generally viewed as having hovered in the grey area between some form of non-international armed conflict (governed by common Article 3 and perhaps meeting at least some of the requirements of 1977 Protocol II), and the lower intensity category of 'situations of internal disturbances and tensions.[105]

William Abresch makes the point that 'the IRA numbered in the hundreds and the conflict remained at a relatively low level of intensity suggesting that the official position that Common Article 3 did not apply was at least tenable'.[106] In addition, there was no 'front' in the Northern Ireland conflict and the IRA never replaced the British government in any territorial area, despite having established 'no go' areas.

1.66. The issue of whether or not Article 3 applies to any particular conflict is an issue not just because of a lack of definitions but also because Article 3 does not identify or provide a competent authority that can make that decision. The United Kingdom was therefore allowed to use its not inconsiderable political weight to have the conflict defined in a way that suited the British government's interests.[107]

1.67. The term civil war has come to be understood within the framework of the 1949 Geneva Conventions and the term is now used to mean a non-international armed conflict. However, in the main, this thesis focuses on events that took place in the late 1960s and 1970s. The British government documents relating to Operation Folklore developed in 1972 that are referred to in this thesis, mention the term

[104] Marc Mullholland, *The Longest War: Northern Ireland's Troubled History* (Oxford University Press 2002) 92.
[105] Colm Campbell, ''Wars on Terror' and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict' (2005) 54(2) The International and Comparative Law Quarterly 321, 333.
[106] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) The European Journal of International Law 741, 756.
[107] See chapter eight para 9.2-9.21 for a more detailed discussion.

civil war many times. Unfortunately, no definition of the term is provided in the declassified files. One possible interpretation is that the government officials were using the term to mean a non-international armed conflict. In other words, the term civil war was used to describe an internal conflict that would be governed by Common Article 3.

1.68. Alternatively, and a much more likely explanation is that Whitehall officials were using the term civil war to mean a situation where the British Army has constitutional authority to impose martial law. The term martial law is being used in the sense that the British Army has 'the common law right of the Crown to repel force by force in the case of a riot, rebellion or insurrection and to take such exceptional measures as may be necessary for the purpose of restoring order'.[108] In a situation where martial law has been imposed the British Army would require no additional legal powers to suppress any violence and restore order. The released files distinguish the situation where no further powers are required, that is when a civil war is in progress, and the situation short of civil war where additional legal powers might be needed. Therefore, it seems likely that in relation to Operation Folklore, the term civil war should be understood to mean a situation where martial law has been imposed and the British Army requires no additional powers to deal with the violence. The position of the British government is that the conflict in Northern Ireland never amounted to a civil war.

1.69. Before examining the substantive elements of the thesis, it might be helpful to first briefly outline the context within which the conflict played out.

[108] TNA (PRO) CAB 164/110 Operation Folklore 1972 Folio 16 (n48)

## Chapter 1: A Brief Overview of The Troubles

2.1. John Finn claims that 'the constitutional issues raised by political violence in Ireland cannot be understood without some appreciation of the historical context within which they are situated'.[109] Therefore, before looking at the constitutional status of the Security Forces and examining the legislation and policies that were introduced during the Troubles, it might be helpful to provide some general background information about Northern Ireland[110] and provide some historical context for the conflict.

2.2. It has been claimed that 'wars do not have a single and simple cause'[111] instead there are 'competing histories and often there is no sound way to choose between them'.[112] Writing about Vietnam, Guenter Lewy commented that:

> …it was always more complex than ideologues on either side could allow. Like pieces in a kaleidoscope, the 'facts' of the Vietnam War could, and still can, be put together in a multitude of configurations which in turn lead to different political and moral judgments and conclusions.[113]

Although Lewy was writing about Vietnam, he could very easily have been writing about the conflict in Northern Ireland. Writing in the Guardian Newspaper David Smith made the same point and cited comments made by Wynton Marsalis, 'sometimes a thing and the opposite of a thing can be true at the same time. Well, in war it may be dozens and dozens of things can be true at the same time'.[114] While acknowledging the complexities of the conflict in Northern Ireland, it might still be useful to provide a brief summary of the main theories of the causes of the conflict.

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[109] John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press 1990) 48.
[110] Northern Ireland, Ulster and the Province are used interchangeably to refer to the six counties of Ireland under British sovereignty.
[111] Joshua Goldstein, *International Conflicts* (Harper Collins–College Publications 1994) 138.
[112] Finn (n109) 48.
[113] Guenter Lewy, *America in Vietnam* (Oxford University Press 1978) vii.
[114] David Smith, 'Epic, 10-part documentary re-examines Vietnam war' *The Guardian* (London 16 September 2017) 25.

## The Statistics

2.3. Northern Ireland has an area of 5,459 square miles and at the start of the Troubles in 1969 it had a population of about 1.5 million people, making it one of the most sparsely populated areas of the United Kingdom. At its closest point, it is just twelve miles from mainland Britain and the proximity of the two islands made a tangled history almost inevitable.

2.4. According to the Census Religious Report of 1971, in Northern Ireland as a whole, 31.4% of the population were Roman Catholic and almost all the rest self–identified as Protestant.[115] The religious makeup of the population was however not uniform across Northern Ireland. In 1971 Belfast was 28.1% Roman Catholic and Londonderry was 57.3% Roman Catholic.[116]

2.5. The Troubles claimed the lives of 3,532[117] people and injured another 35,000.[118] John McGarry and Brendan O'Leary have calculated that in the context of population then this amounts to the equivalent of 100,000 deaths in Great Britain and represents the equivalent in the United States of ten times the number of US soldiers killed in Vietnam.[119] In terms of the numbers injured a 'comparable figure in the United States would be 5 million and in Britain just over 1 million'.[120]

2.6. The cost of the Troubles, both human and economic, has been mounting since the time of the first civil rights marches in 1968. In 1993, the Labour MP Tony Benn

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[115] Department of Health and Social Services, Northern Ireland Statistics and Research Agency, Registrar General Northern Ireland. Northern Ireland Census 1991 Religion Report (Belfast, 1993). HMSO <www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/1991-census-religion-report.pdf> accessed 10 October 2017.
[116] Northern Ireland General Register Office Census of Population 1971 Religion Tables Northern Ireland (Belfast, 1975) HMSO <www.nisra.gov.uk/sites/nisra.gov.uk/files/publications/1971-census-religion-report.pdf> accessed 10 October 2017.
[117] Malcolm Sutton, *Bear in Mind These Dead … An Index of Deaths from the Conflict in Ireland 1969-1993* (Beyond the Pale 1994) reproduced in CAIN at <http://cain.ulst.ac.uk/sutton/chron/index.html> accessed on 17 March 2017.
[118]Landon Hancock, 'Northern Ireland: Troubles Brewing' (1998) <http://www.cain.ulst.ac.uk/othelem/landon.htm> accessed 7 April 2017.
[119] John McGarry, Brendan O'Leary, *The Politics of Antagonism: Understanding Northern Ireland* (Athlone Press 1996) 12-13.
[120] Ed Moloney, *A Secret History of the IRA* (Penguin Books 2003) xiv.

issued the following statement, 'I asked the House of Commons research department to calculate the cost of the emergency and at current prices the cost of the war has been £14.5 billion'.[121]

2.7. The Troubles became the focus of the longest major campaign in the history of the British Army. During the Troubles, troop numbers in Ulster varied between 2,500 in 1969, then up to 8,500 in 1970, and in early 1971 they rose to 10,000. For Operation Motorman in July 1972 numbers peaked at 23,000 (The figure of 23,000 does not include men from the Ulster Defence Regiment (UDR)).[122] 'The British Army lost 763 soldiers in Northern Ireland, more than in Iraq, Afghanistan, the Falklands, and the first Gulf War combined.'[123] The Royal Ulster Constabulary (RUC) lost 302 officers from a force that numbered between 8,000 and 10,000.[124]

2.8. The conflict has generated a large volume of literature from academics and commentators alike making 'Northern Ireland one of the most researched areas of the globe'.[125] J Bowyer Bell quipped, 'The only undeniable blessing to evolve from the recent troubles in Northern Ireland has been a miniboom in the publishing industry.'[126] However, although a lot has been written there is very little consensus about any aspect of the conflict including what it was about or even when it started. For example, Eamonn McCann claimed that the Troubles began on 5 October 1968[127] whereas Desmond Hamill identified the 14 of August 1969, the day British troops were deployed, as the day the Troubles began.[128]

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[121] Statewatch Bulletin Nov/Dec 1993 3(6) <http://www.statewatch.org/docin/bulletin/bul-3-6.pdf> accessed 24 December 2017.
[122] David Chartres, 'The Changing Forms of Conflict in Northern Ireland' (1980) 1(2) Conflict Quarterly 32.
[123] John McGarry, 'Conflicts and Metaconflicts: Northern Ireland and Lessons for Other Hard Cases' [2013] (5) The Trudeau Foundation Papers <http://www.trudeaufoundation.ca/sites/default/files/an_academic_conflict_resolution.pdf> accessed 17 April 2016.
[124] ibid.
[125] Paul Dixon, 'The Origins of the Present Troubles in Northern Ireland' (1998) 21(2) Studies in Conflict and Terrorism 224.
[126] J Bowyer Bell, 'The Chroniclers of Violence in Northern Ireland: The First Wave Interpreted (1974) 34(2) The Review of Politics 147.
[127] Eamonn McCann, *War and an Irish Town* (Pluto Press 1993) 83.
[128] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 13.

While Landon Hancock claims that the Troubles 'did not start on a specific date, but emerged as a result of several years of escalating conflict between Catholic and Protestants'.[129]

2.9. Bowyer Bell claims that 'without exception the [conflict] is seen as a product of forces, institutions, currents of thought, social structures and habits of mind that have a long, long history'.[130] He claims that the most recent conflict begins 'back there in the grim Celtic mists of old grievances, old wars and old hatreds'.[131] But although all agree that the Troubles have historical roots, 'the present political violence in Northern Ireland results from the clash of interpretations of this history and the differing aspirations and allegiances to which it gave rise'.[132]

## The Historical Context

2.10. Explaining the Troubles in terms of the different constitutional aspirations of the Protestant and Roman Catholic communities in Northern Ireland is simple. The Roman Catholic community tended to identify as Irish and wanted to become part of the Republic of Ireland. The goal of the Unionists and the overwhelming Protestant majority in Northern Ireland was to remain part of the United Kingdom. There is no doubt this disagreement about the constitutional status of Northern Ireland lies at the heart of the conflict. However, it has been argued that 'this over-arching conflict cannot alone serve as the basis for an explanation for the turn to violence at the end of the 1960s and the start of the 1970s'.[133]

2.11. Before looking at the different explanations that have been put forward to explain the Troubles it might be useful to give a brief overview of the historical narrative. Identifying the beginnings of the conflict is perhaps the first problem. Given this is a very brief outline perhaps the Act of Union in 1801,[134] which followed the

[129] Hancock (n118).
[130] Bowyer Bell (n126) 147.
[131] ibid 148.
[132] Brian Gormally, Kieran McEvoy, David Wall, 'Criminal Justice in a Divided Society: Northern Ireland Prisons' (1993) 17 Crime and Justice 51, 59.
[133] Simon Prince, Geoffrey Warner, 'The IRA and Its Rivals: Political Competition and the Turn to Violence in the Early Troubles' (2013) 27(3) Contemporary British History 271, 288.
[134] The Union of Ireland Act 1800 passed at Westminster and the Act of (Ireland) Union 1800 passed by the Parliament in Ireland.

piecemeal conquest of Ireland by the English after 1169, is as good a place to start as any. The Act of Union united Great Britain and Ireland to create the United Kingdom of Great Britain and Ireland.[135] The union was created despite centuries of tension, including armed and political uprisings, between the Protestant minority and the Roman Catholic majority in Ireland.

2.12. However, in the late nineteenth century the Irish Nationalist Party and the Home Rule Party began lobbying the British government for some form of self-government for Ireland. Opposing any idea of home-rule for Ireland were the Irish Unionists, a significant Protestant minority, who wanted to retain the Union in its existing form, but failing that wanted to exclude the nine counties of Ulster from any home-rule arrangements. As the lobbying for some form of home-rule gathered momentum, the Protestants too began to organise themselves politically and created the Ulster Volunteer Force to resist home-rule. And so, the battle lines were drawn.

2.13. After WWI, the pressure for independence mounted and the British government eventually agreed to a limited independence. Northern Ireland was created as a separate legal entity on 3 May 1921 under the Government of Ireland Act 1920. The Act partitioned the island of Ireland into Northern Ireland made up of six Northeastern counties of Ulster[136] and the Irish Free State made up of the remaining twenty-six counties including three counties from Ulster.[137] The Free Irish State at the time of partition was 90% Roman Catholic [138] and the new Northern Ireland had an in-built Protestant majority of roughly 65%.[139] The first Prime Minister of Northern Ireland, Sir James Craig, declared that they had created 'a Protestant Parliament and a Protestant State'.[140]

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[135] The term 'United Kingdom' covers all of Britain including Northern Ireland. The term 'Great Britain' excludes Northern Ireland and covers only Wales, England and Scotland.
[136] The six counties are Londonderry, Antrim, Down, Tyrone, Armagh and Fermanagh. The three counties of Ulster south of the border were Donegal, Monahan and Cavan.
[137] The Irish Free State had dominion status in the British Commonwealth until 1937 when it gained full independence.
[138] Mari Fitzduff, Liam O'Hayan, 'The Northern Ireland Troubles: Background Paper' [2009] CAIN: <http://cain.ulst.ac.uk/othelem/incorepaper09.htm> accessed 1 April 2017.
[139] John Darby, Roger MacGinty, *Guns and Government: The Management of the Northern Ireland Peace Process* (Palgrave 2002) 15.
[140] McGarry, O'Leary (n119) 107.

2.14. Under these new arrangements, a twin-chambered legislature was created in Stormont, near Belfast, that had authority to enact laws for the 'peace, order and good government' [141] over a number of devolved powers, including policing, education, local government and social services. But sovereignty was retained in Westminster along with responsibility for policy relating to defence, foreign affairs and taxation.[142]

2.15. The courts in Northern Ireland were to administer the laws passed at Westminster that expressly stated that they were to apply to Northern Ireland, as well as the laws enacted by the Stormont Parliament. The common law continued to be applied to the extent it was consistent with legislation from both these sources. The Court of Appeal in Northern Ireland referred cases for final appeal to the House of Lords.

2.16. The split, in terms of religion, left Northern Ireland in an unstable situation. The majority of the total population in Northern Ireland supported the constitutional link with the United Kingdom but the Roman Catholics, making up a significant minority, generally favoured the reunification of Ireland. In addition to the differing aspirations of the two communities, there was also mistrust and separateness between the two communities, with each community continuing to be defined by its religious allegiance. It has been suggested that, 'Had the architects of the 1921 Settlement set out to create an inherently unstable entity, they could scarcely have done better than to design Northern Ireland in the way they did.' [143]

2.17. The depth of division between the two communities is revealed in the perceptions of ordinary members of the public who lived through the violence, which were recorded by Ronnie Munck. Many of the comments vividly capture the nature and

[141] Government of Ireland Act 1920 Section 4 (1).
[142] ibid.
[143] Moloney (n120) xv.

extent of the divisions felt by ordinary people. A good example would be the observations made by Michael Farrell[144] who commented:

> I just never mixed with any Protestants of my own age because we went to different schools, played different games, and even when we played the same games like tennis, there was a Protestant and Catholic tennis club.[145]

2.18. Bowyer Bell described the deeply divided community in similar terms, observing that:

> Children prattle different nursery rhymes, play different games, curse with different words, live from the moment of birth in an alien world to that of the child across the lane - and when full grown gain certain benefits from the difference.[146]

2.19. The divisions were both social and physical. The Protestants and Roman Catholics attended different schools, different clubs and pubs, they worked in different factories and institutions, and they lived in separate areas of the cities.

2.20. Before looking at the various explanations of the conflict that have been put forward it is worth briefly stating what the conflict was not about. Throughout the conflict there was nothing of strategic value at stake. 'There were no oilfields or goldmines to be captured.'[147] For this reason the Troubles were unlike the intractable conflicts of the Middle East and yet throughout the conflict 'no one could really see an end to it'.[148]

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[144] Michael Farrell was a founding member of the People's Democracy Party and so arguably was not an ordinary member of the community.
[145] Ronnie Munck, 'The Making of The Troubles in Northern Ireland' (1992) 27(2) Journal of Contemporary History 211, 212.
[146] J Bowyer Bell, *The Gun in Politics: Analysis of Irish Political Conflict 1916-1986* (Transaction Publishers 1987) 280.
[147] Moloney (n120) xiii.
[148] ibid.

2.21. However, the Troubles can be understood as having 'a beginning, a middle and some sort of an end'.[149] If each phase can be understood to exist within a different context, then this would arguably allow State behaviour to be judged according to a different yardstick in each phase.

2.22. The main phases of the conflict are 'outbreak and militarisation (1969-1976); criminalisation (1977-94); and transition (1995-2004)'.[150] The first phase was the most violent, and saw the deployment of British troops, the re-emergence of paramilitary groups (both republican and loyalist), and resort to internment without trial. The second phase saw the policy of police primacy introduced in 1976 and the rhetoric tended to emphasise the criminal nature of the conflict. It also saw the level of violence stabilise. The final phase covers the transition from violence to a political process.[151]

2.23. When looking at the constraints imposed by law the phase of the conflict arguably takes on a greater significance. The argument is that States should be allowed greater latitude at the beginning of an emergency when the State is attempting to stabilise a sudden, turbulent but temporary violent situation rather than at the middle or end of a conflict when the situation is still violent but relatively predictable.[152] The focus of this thesis is mainly the early years of the conflict and any conclusions drawn relate primarily to those years.

## Explanations of The Troubles

2.24. The Troubles have been explained in various ways. McGarry and O'Leary explain the conflict in terms of two national communities, one Irish and one British, and both wanting to be governed by its own nation State. In other words, Northern

[149] Colm Campbell, ''Wars on Terror' and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict' (2005) 54(2) British Institute of International and Comparative Law 321, 326.
[150] ibid.
[151] These phases are not universally accepted. For example, Robert Rose claims that Phase 1 is 1970-1979, phase 2 is 1980-1987 and phase 3 is 1988-1990s. See Robert Rose, 'Protestant Paramilitaries in Northern Ireland 1969-1992' (MA thesis, Naval Postgraduate School Monterey 1999) 9.
[152] This was the argument made in an Amicus Brief by Liberty, Interights and the Committee on the Administration of Justice in *Ireland v UK* Application No. 5310/71 (1972) 15 YB 67.

Ireland was a deeply divided society along national lines. This explanation of the conflict has gained traction and has been described as 'the most orthodox explanation of the conflict'[153] having achieved 'hegemonic status'.[154]

2.25. There are however other explanations for the conflict, one of which is that the conflict was essentially a conflict over religion. McGarry argues that this 'is the most common, popular [explanation] of them all, at least outside Northern Ireland'.[155] This belief is echoed by Bowyer Bell who makes the point that 'to the common viewer of BBC it seemed almost inexplicable - a 'religious' war in the mid-twentieth century in Great Britain'.[156] For the British public it appeared to be a religious war because Roman Catholics were fighting Protestants. The view that the conflict was about religion took various forms. One version of this theory was that the conflict was caused by educational segregation in religious-based schools.[157] However, any explanation based on religion, in which ever form it takes, is to some extent inadequate because the Protestants were not fighting to prove the superiority of their version of Christianity and nor were the Roman Catholics. The Roman Catholics were fighting for the unification of Ireland and the Protestants were fighting to remain united with Britain.

2.26. However, other explanations have also been put forward. John Whyte argued, in what Gormally and others have described as his seminal work,[158] that there are essentially four interpretations of the conflict in Northern Ireland.[159] These he described as being the traditional nationalist, the traditional Unionist, the Marxist and the two community or internal conflict interpretation. These four interpretations can be summarised in the following way.

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[153] Adrian Edwards, 'Interpreting the Conflict in Northern Ireland' (2007) 6(1) Ethnopolitics 137, 138.
[154] Rupert Taylor, 'Introduction: The promise of consociational theory' in Rupert Taylor (ed), *Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict* (Routledge 2009) 310.
[155] McGarry (n123).
[156] Bowyer Bell (n126) 148.
[157] Segregation in the education system was defended by the Roman Catholic hierarchy in particular.
[158] Gormally, McEvoy, Wall (n132) 59.
[159] John Whyte, *Interpreting Northern Ireland* (Oxford University Press 1991) 114.

2.27. The traditional nationalist perspective focuses on the 1920 Government of Ireland Act, passed by the British government, which created two devolved Irish Parliaments and split the country against the wishes of the majority of the people of Ireland. Northern Ireland's borders were drawn up with the twin aims of maximising the size of the country and ensuring a Protestant majority. From the traditional nationalist perspective, members of the IRA (and its splinter groups) were viewed as fighting a 'war' of liberation against the British occupation. The IRA mounted periodic bombing campaigns and armed attacks in Britain and Northern Ireland targeting military and police institutions as well as civilians.[160] For their part in this war the British put the British Army on the streets of Ulster, introduced repressive emergency legislation including internment, sponsored Loyalist paramilitary violence and promoted revisionist histories. The goal of the nationalists was British withdrawal from Northern Ireland and Protestants to be peacefully integrated into a united Ireland.

2.28. The traditional Unionist perspective was that Northern Ireland should be further integrated into the United Kingdom. In other words, Stormont should be dismantled, and Northern Ireland should be governed by Westminster in the same way that Wales was at the time. The problem with this view is that it ignored the views of the Roman Catholic minority and their strong support for a united Ireland. The traditional Unionist perspective saw Northern Ireland as being under threat from within by the minority Roman Catholic community and from a hostile government to the South that claimed Northern Ireland as part of its own national territory.[161]

2.29. Adrian Guelka has identified a third threat facing the Unionists in the form of a treacherous British government, willing to sell them out in order to bring an end to the violence.[162] This view is echoed by McGarry who states that:

[160] The most sustained effort was the Border Campaign of 1956-1962.
[161] Article 2 of the 1937 Irish Constitution declared, 'The National territory consists of the whole of the island of Ireland, its islands and the territorial seas.'
[162] Adrian Guelke, *Northern Ireland: The International Perspective* (Gill and MacMillan 1988) 195.

> Even by partition in 1921 many of the British elite were willing to abandon all of Ireland, seeing its retention as a risk to Britain's political security. By the end of the 20th century the consensus shared by the British elite and the British public alike was that Northern Ireland was more of a drain on the British treasury than it was an exploitable colony.[163]

2.30. The Cameron Committee, appointed by Northern Ireland's Prime Minister, Terence O'Neill, to examine the causes of violence in Ulster in 1968 and 1969, reported that it had heard 'sentiments of fear and apprehension of a threat to Unionist domination and control of government by increases in the Catholic population'.[164] In order to protect the State, the Unionist government of 1920 created an armed or militarised police force[165] and then under the Civil Authority (Special Powers) (Northern Ireland) Act 1922[166] introduced wide ranging powers which included powers to introduce curfews,[167] powers to ban political parties, rallies and marches,[168] powers to close licensed premises, powers to introduce internment.[169] The Cameron Report commented that the Special Powers Act was remarkable because of the width of powers it gave to the RUC.[170]

2.31. So, both of these explanations separate people into Irish Nationalists and Ulster Unionists and then sub-divide both camps into moderates and extremists. The important division that existed was the Nationalist/Unionist divide. Any rifts that existed within the various camps thereafter related to proposed strategies on how to achieve the agreed goals, rather than a disagreement over what those goals should be. Neither explanation attempts to de-couple the violence from the problem of who has the right to rule Northern Ireland.

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[163] McGarry (n123) 50
[164] Report of the Commission Appointed by the Government of Northern Ireland *Disturbances in Northern Ireland* (Cmd 532, 1969) para 229a. (Cameron Report)
[165] The government of Northern Ireland could not raise an army under the 1920 Act and so continued with an armed police force with some responsibility for security.
[166] Civil Authority (Special Powers) Act (Northern Ireland)1922.
[167] ibid Regulation 1.
[168] ibid Regulation 3(1)(a) and Regulation 4.
[169] ibid Regulation 23.
[170] The Cameron Report (n164) para 9.

2.32. The Marxist perspective, as applied to Northern Ireland, believed that victory for the workers was impossible to achieve through the partition of Ireland. The partition would fuel nationalism at the expense of class politics and would also lead to the emergence of strong conservative capitalist forces in both countries. The capitalists on both sides of the border would seek to divide and therefore weaken the working class by setting the Roman Catholic and Protestant workers against each other. The solution was therefore a united Ireland.[171]

2.33. The internal conflict theory is the most popular approach taken in official reports and in the academic literature.[172] Taking this approach the conflict is understood to be between two communities 'with very different traditions, identities and allegiances'.[173] Political violence is understood to be largely the product of the state of relations between the communities. The role of the Irish government in the south and the British government is downplayed.

2.34. One variant of this explanation for the violence that occurred in Northern Ireland from 1968 is that the violence was a response by the Roman Catholic community to systematic discrimination by the majority Protestant community in both Stormont[174] and at a local government level.[175] This explanation for the violence focuses on the grievances of the Roman Catholic community and those advocating this explanation either implicitly or explicitly downplay the role of nationalism as a cause of the violence. It focuses on economic inequality as a source of Catholic alienation.[176] 'Catholics had worse jobs, incomes, houses and

[171] Desmond Ryan, (ed), *Socialism and Nationalism: A Selection from the Writings of James Connolly* (At the Sign of the Three Candles 1948) 9.
[172] Taylor (n154) 310.
[173] Robert Mark, 'Keeping the Peace in Great Britain: The Differing Roles of the Police and the Army' in P Rowe, C Whelan, (eds), *Military Intervention in Democratic Societies* (Croom Helm 1985) 90.
[174] The government of Northern Ireland had been Unionist since it was established in 1920.
[175] Christopher Hewitt, 'Catholic Grievances, Catholic Nationalism and Violence in Northern Ireland during the Civil Rights Period: A Reconsideration' (1981) 32(3) The British Journal of Sociology 362.
[176] This view that the conflict stems from economic inequality has been linked to Roman Catholic's having larger families, arguably an indirect result of inequality, as well as Roman Catholic doctrine.

other material goods than Protestants.'[177] The Cameron Committee confirmed that these 'social and economic grievances or abuses of power ... were in a very real sense an immediate and operative cause of the demonstrations and consequent disorders'.[178]

2.35. This explanation is often coupled with the idea that at the time Irish nationalism was on the decline and that there was a movement towards left-wing ideologies.[179] The Cameron Report also reported a reduction in concern with partition.[180] However, Christopher Hewitt challenges this idea, claiming that there is no evidence to support this assertion. In fact, he cites data relating to the number of votes cast for parties committed to a united Ireland that tends to support the reverse position. He shows that in 1955, 1959, 1964 and 1966 elections candidates standing for a united Ireland contested every election. In 1951, as a percentage of the total Northern Ireland vote, the nationalist vote was 26%. This dipped to 14.5% of the total Northern Ireland vote in 1959 but by 1964 and 1966 as a proportion of the total vote, the nationalist vote was 18.2% and 21.1% respectively.[181]

2.36. Those who saw inequality as the problem pointed out that Roman Catholic protests had begun in the mid-1960s with the mobilisation of the Northern Ireland civil rights movement.[182] The Scarman Report suggested that the civil rights movement was inspired by the student riots in France which encouraged the 'belief that a policy of street demonstrations at critical places could achieve results, if only because they would attract the attention of the mass media'.[183] It

[177] Edmund Aunger, 'Religion and Occupational Class in Northern Ireland' (1975) 7(1) Economic and Social Review 1, 17.
[178] The Cameron Report (n164) para 127.
[179] Hewitt (n175) 369.
[180] The Cameron Report (n164) para 12.
[181] Hewitt (n175) 370.
[182] The civil rights movement was made up of various different organisations such as the Northern Ireland Civil Rights Association, Official and Provisional Irish Republican Army, members of the Communist Party, University students from Queen's University Belfast, People's Democracy Party and the Derry Citizens Action Committee.
[183] Report of the Tribunal of Inquiry *Violence and Civil Disturbances in Northern Ireland in 1969* (The Scarman Report) *(*Cmnd 566, 1972) para 2.2. (The Scarman Report)

has also been suggested that the civil rights movement in Northern Ireland was inspired by the civil rights movement in the United States.[184]

2.37. Hewitt makes the point that:

> There is general agreement as to the Catholic grievances. They were the franchise gerrymandering, the allocation of houses and jobs by local councils, discrimination by private firms and lack of economic aid leading to high rates of unemployment in Catholic areas.[185]

2.38. The Cameron Report lists seven causes of the violence and all these issues were cited.[186] The franchise problem had two aspects to it. The first concerned the

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[184] Rod Thornton, 'Getting it Wrong: The Crucial Mistakes Made in the Early Stages of the British Army's Deployment to Northern Ireland (August 1969 to March 1972)' (2007) 30(1) Journal of Strategic Studies 73, 75.

[185] Hewitt (n175) 363.

[186] The Cameron Report (n164) para 128-226.
The general causes listed in the Report were:
(1) A rising sense of continuing injustice and grievance among large sections of the Catholic population in Northern Ireland, in particular in Londonderry and Dungannon, in respect of (i) inadequacy of housing provision by certain local authorities (ii) unfair methods of allocation of houses built and let by such authorities, in particular; refusals and omissions to adopt a 'points' system in determining priorities and making allocations (iii) misuse in certain cases of discretionary powers of allocation of houses in order to perpetuate Unionist control of the local authority (paragraphs 128-131 and 139).
(2) Complaints, now well documented in fact, of discrimination in the making of local government appointments, at all levels but especially in senior posts, to the prejudice of non-Unionists and especially Catholic members of the community, in some Unionist controlled authorities (paragraphs 128 and 138).
(3) Complaints, again well documented, in some cases of deliberate manipulation of local government electoral boundaries and in others a refusal to apply for their necessary extension, in order to achieve and maintain Unionist control of local authorities and so to deny to Catholics influence in local government proportionate to their numbers (paragraphs 133-137).
(4) A growing and powerful sense of resentment and frustration among the Catholic population at failure to achieve either acceptance on the part of the Government of any need to investigate these complaints or to provide and enforce a remedy for them (paragraphs 126-147).
(5) Resentment, particularly among Catholics, as to the existence of the Ulster Special Constabulary (the 'B' Specials) as a partisan and paramilitary force recruited exclusively from Protestants (paragraph 145).
(6) Widespread resentment among Catholics in particular at the continuance in force of regulations made under the Special Powers Act, and of the continued presence in the statute book of the Act itself (paragraph 144).
(7) Fears and apprehensions among Protestants of a threat to Unionist domination and control of Government by increase of Catholic population and powers, inflamed in particular by the activities of the Ulster Constitution Defence Committee and the Ulster Protestant Volunteers, provoked strong hostile reaction to civil rights claims as asserted by the Civil Rights Association and later by

giving of up to six extra votes to businessmen in local government elections. The second problem was that large numbers of people were deprived of a vote because they did not own property. This was the case for both Roman Catholics and Protestants. But the argument ran that the system gave the prosperous protestant business community additional votes while depriving the vote to poor Roman Catholics who lived in rented accommodation.

2.39. Hewitt argues that the franchise issue provided the Northern Ireland Civil Rights Association (NICRA) with its 'most emotive slogan, 'One man, one vote'.[187] In addition to the franchise issue, there was also the manipulation of ward boundaries or gerrymandering, which led the Cameron Committee to comment that:

> In particular, the arrangement of ward boundaries for local government purposes has produced in the local authority a permanent Unionist majority that bears little or no resemblance to the relative numerical strength of Unionists and non-unionists in the area.[188]

2.40. However, gerrymandering was not limited to Derry. The Sunday Times Insights Team maintained that the gerrymandering in Derry was 'one of a pattern'.[189] And Elliot and Hickie identified gerrymandering in Dungannon, Downpatrick, Enniskillen and several other towns in Southern Ulster.[190]

2.41. Rod Thornton gives an example of gerrymandering in Derry where 14,000 Roman Catholic voters could return eight councilors to the city council while 8,000 Protestant voters could return twelve.[191] The Cameron Committee concluded that 'the complaint that electoral arrangements were weighted against non-unionists...[was] abundantly justified'.[192]

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the People's Democracy which was readily translated into physical violence against Civil Rights demonstrators (paragraphs 148-150 and 216-226).

[187] Hewitt (n175) 363.

[188] The Cameron Report (n164) para 136.

[189] The Sunday Times Insight Team, *Ulster* (Harmondsworth, Penguin Special, 1972) 35.

[190] RSP Elliott, John Hickie, *Ulster: A Case Study in Conflict Theory* (Longman 1971) 41

[191] Thornton (n184) 75.

[192] The Cameron Report (n164) para 147.

2.42. Another grievance was that the Protestant-run councils abused their power and systematically discriminated against Roman Catholics in the allocation of council houses and local government jobs. Yet another grievance was that central government funds were disproportionately spent on large infrastructure projects in Protestant areas while the economic development of Roman Catholic areas was sidelined. The usual example given is the building of the University of Ulster in Coleraine rather than Derry. There was further economic discrimination in that Protestant firms tended to give jobs to Protestant applicants. For instance, the Belfast shipbuilders, Harland and Wolff, had 10,000 Protestant workers and only 400 Roman Catholic workers.[193] The unemployment figures for Northern Ireland in the 1971 Census Reports show that for male and female Protestants respectively the percentage unemployment figures were 7% and 4% but for male and female Roman Catholics the figures were 17% and 7% respectively.[194]

2.43. These grievances were belatedly recognised by the Protestant community and acknowledged by David Trimble, former leader of the Ulster Unionist Party and First Minister of Northern Ireland when he described Northern Ireland as a "cold house for Catholics" in his Nobel Lecture in 1998 in Oslo.[195] Inequality and discrimination ignited the protest movement in mid-to-late-1960s but if inequality and discrimination were the problem then very quickly the solution became a united Ireland.

2.44. However, although some discrimination is undeniable the extent of the discrimination is contested. Hewitt for example, explains that the franchise issue was grossly exaggerated and that in terms of numbers it affected only 1.3% of the total electorate affecting 8,370 people, some of whom were Roman Catholic.[196] In relation to the disenfranchisement issue Hewitt claims that in fact 60% of those disenfranchised were Protestant. Hewitt also contests the extent of the

[193] Peter Taylor, *Brits: The War Against the IRA* (Bloomsbury 2001) 17.
[194] R Osborne, R Cormack, 'Unemployment and Religion in Northern Ireland' (1986) 17(3) The Economic and Social Review 215.
[195] David Trimble's Nobel Peace Prize Acceptance Speech, Oslo, 10 December 1998 quoted in Paul Dixon, *Northern Ireland: The Politics of War and Peace* (Palgrave Macmillan 2008) 68.
[196] Hewitt (n175) 365.

gerrymandering, suggesting that the areas classified as gerrymandered were done so incorrectly due to an 'ignorance of fertility differences between Catholics and Protestants'.[197] Hewitt goes on to explain that 'higher Catholic fertility means that the proportion of Catholics in the voting age population is noticeably lower.' [198] The use of the word 'fertility' is a source of some confusion here. However, his argument seems to be that it is misleading to look at the percentage of the total population who are Roman Catholic and then look at the percentage of Roman Catholic councillors that get elected because a greater percentage of the Roman Catholic total population are not of voting age when compared to the make-up of the protestant population.

2.45. Hewitt further suggests that discrimination was systematically practiced by Roman Catholic-run councils as well as by Protestant-run councils. He quotes the Loyalty Survey which shows that the 'greatest bias lies in the treatment of Protestants by Catholic Councils'.[199] He also argues that Protestant firms hired Protestants and Roman Catholic firms hired Roman Catholics but that is just the nature of communal solidarity. Hewitt goes on to assert that:

> Certain examples of discrimination such as the low proportion of Roman Catholics working in the Belfast shipyards or the placing of a university in Coleraine rather than Londonderry are cited *ad nauseam* implying that they are the only examples of discrimination available.[200]

2.46. The Cameron Report concluded that a sense of injustice had been a general contributory factor in the violence and noted that 'resentment and frustration among the Catholic population at the failure to achieve either acceptance on the part of the government or any agreement to investigate these complaints or to provide any remedy for them'.[201]

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[197] ibid.
[198] ibid.
[199] ibid.
[200] ibid 364.
[201] The Cameron Report (n164) para 229.

2.47. An alternative interpretation of the role of systematic discrimination and inequality exists and that is that although there was a need for reform in Northern Ireland, talk of reform was a 'blind', a kind of camouflage for an attack on the State. Caroline Kennedy-Pipe makes the point that, 'the Provisionals, operating behind the façade of the civil rights movement, reignited the battle between the forces of Irish Republicanism and Britain'. [202] The civil rights movement, according to this interpretation, was simply a Trojan horse for the IRA now seeking new means to obtain old objectives.[203]

2.48. However, this theory has been heavily criticised by Bob Purdie who states that the weight of evidence suggests that 'the IRA were totally unprepared for the communal violence of the late 1960s'.[204] And he argues that although the Official IRA did play an influential part in the Northern Ireland civil rights movement, the Official IRA were seeking a political solution and 'came to be seen as moderate compared with the Provisional IRA and its supporters'.[205]

2.49. Whatever the inspiration and whether or not it was a Trojan horse for the IRA, the civil rights movement in Northern Ireland in 1968 gathered support. The Derry Citizens' Action Committee marches in November 1968 were larger than any of the American civil rights marches held in Birmingham in 1963 and in Selma in 1965.[206] The Northern Irish civil rights movement has been described as 'one of the largest and most successful non-violent movements for change in the post–war world'.[207]

2.50. Through peaceful means it had achieved notable successes by November 1968.

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[202] Caroline Kennedy-Pipe, *The Origins of the Present Troubles in Northern Ireland* (Longman 1997) 3.
[203] Jonathon Tonge, *Northern Ireland Conflict and Change* (Routledge Taylor Francis Group 1988) 44.
[204] Bob Purdie, 'Was the Civil Rights Movement a Republican/Communist Conspiracy?' (1988) 3 Irish Political studies 34.
[205] ibid 39.
[206] Bob Purdie, *Politics in the Streets: The Origins of the Civil Rights Movement in Northern Ireland* (Blackstaff Press 1990) 192-4.
[207] Prince, Warner (n133) 271.

> A points system for public-housing allocation was to be adopted, a British-style Ombudsman was to be appointed, the emergency powers that breached the European Convention on Human Rights were to be withdrawn, a Commission was to replace the Unionist-controlled Derry Council…and the company vote was to be abolished.[208]

The Northern Irish government also promised to investigate the violence and review policing in the Province. In addition, universal adult suffrage in local elections had been accepted by the spring 1969.[209] Yet these significant advances did not prevent the descent into violence.

2.51. The violence is generally understood to be an escalation of the long-standing intractable conflict between unionists and nationalists. The violence took the form of rioting but then evolved into a low intensity conflict with the main protagonists being the British State, the republican paramilitaries [210] and loyalist paramilitaries. [211] On this understanding the Troubles are viewed as a 'continuation, and intensification, of the communal struggle'. [212] The deep divisions in society are the necessary precondition and all that is required is to identify the particular 'trigger' that sparked the escalation. Hennessey points to the decision of the Provisional Irish Republican Army (PIRA) in January 1970 to embrace violence. [213] Niall O'Dochartaigh suggests that the trigger was the repressive action of the State. He argues that on the 5 October 1968 the RUC charged into a civil rights march, and revealed a State that was both 'aggressive and weak ... making violence a logical outcome'.[214]

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[208] Prince, Warner (n133) 276.
[209] Prince, Warner (n133) 289.
[210] Republican paramilitaries included the Irish Republican Army (IRA), the Official Irish Republican Army, the Provisional Irish Republican Army (PIRA), Irish National Liberation Army (INLA), the Irish People's Liberation Organisation (IPLO), the Continuity Irish Republican Army and the Real Irish Republican Army.
[211] Loyalist paramilitaries included the Ulster Defence Association (UDA), Ulster Volunteer Force and the Ulster Freedom Fighters.
[212] Marc Mulholland, *Northern Ireland at the Crossroad: Ulster Unionism in the O' Neill Years 1960-9 (*Macmillan 2000) ix, 162.
[213] Thomas Hennessey, *Northern Ireland: The Origins of the Troubles* (Gill and Macmillan 2005) 394.
[214] Niall O' Dochartaigh, *From Civil Rights to Armalites; Derry and the Birth of the Irish Troubles* (Palgrave Macmillan 2005) 7-11.

2.52. An alternative understanding of the violence has been provided by Prince and Warner who argue that the violence was not simply an escalation of what had gone on before but 'instead a distinct form of conflict'.[215] The violence was not inevitable but rather a choice. They reject the usual two–sided contest between Irish nationalists and Ulster unionists. Instead they argue that the fragmentation and competition 'among and within the organisations which made up the Northern Irish civil rights movement are actually central to explaining why some of those groups chose violent strategies'.[216] They maintain that the infighting within the civil rights movement is more important to understanding the descent into violence than the overarching nationalist/Unionist conflict. Their explanation focuses on the intense political competition between the different groups within the civil rights movement and the Republican movement causing both movements to fracture.

2.53. In an attempt to trace out the significant events that led to the Troubles, the Scarman Report[217] identified a series of protest marches and Orange Order marches that descended into violence. The Report identified one matter that seemed to ignite the imagination of the non-unionist minority in the Province and greatly increased the standing and influence of the NICRA. The matter involved the allocation of a house to an unmarried Protestant girl over Roman Catholic families with children. In protest, Roman Catholics took to the streets in June 1968.

2.54. Later that year a civil rights demonstration was planned for the 5 October 1968 in Derry. The Northern Ireland government at Stormont banned the march but the ban was defied and violence between police and demonstrators occurred. Further violence broke out on a march on the 4 January 1969 from Belfast to Derry that saw clashes between Protestants and Roman Catholics at Burntollet Bridge. The rioting on this occasion spread to Derry and continued until the 5 January 1969.

[215] Prince, Warner (n133) 273.
[216] ibid.
[217] The Scarman Report (n183) para 1.3.

2.55. The Scarman Report noted that the demonstrations left the Protestant majority feeling insecure and hostile.[218] Outraged loyalists responded with more civil unrest and violence. There was serious rioting by Protestants from the Crumlin Road area on the 2 August 1969 when efforts were made to invade Unity Flats. On this occasion, the police held back the rioters with difficulty. The Scarman Report states that 'The Commissioner and Deputy Commissioner concluded that they were unable any longer to control the serious disturbances in the City of Belfast. Both of these officers felt the time had come to call in the Army.'[219]

2.56. The police were simply not strong enough to deal with the violence. The overall strength of the RUC was 3,200. The 'B' specials of which there were 8,500 had already been committed.[220] There were no policemen available from the mainland to reinforce the RUC.[221]

2.57. On the 12 August 1969, the traditional Apprentice Boys Parade was due to take place in Derry. The march degenerated into a three-day pitched battle in Derry that sparked violence elsewhere including serious disturbances in Belfast. The violence in Derry is referred to as the 'Battle of the Bogside'.

2.58. The British Army was deployed on the 15 August 1969 as military aid to the civil power.[222] The troops were drawn from the normally established garrison of some 2,500 soldiers based in the Province. The fact that the levels of violence necessitated troops on the streets of both Belfast and Derry indicates that Northern Ireland was in crisis. The next chapter will examine the various theories that try to explain how democratic governments are controlled when faced with such crises.

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[218] ibid para 1.8.
[219] ibid para 1.18.
[220] Hamill (n128) 11. Hamill also states that 'The 'B' specials were almost exclusively Protestant and were hated by the Catholic community who alleged that they acted brutally whenever they were utilised.'
[221] ibid.
[222] Robin Evelegh, *Peace Keeping in a Democratic Society: The Lessons from Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978) 7.

## Chapter 2: Theories of Emergencies in Democratic States

3.1 With British soldiers deployed on the streets of Belfast and Derry and the levels of violence in Northern Ireland rapidly rising, the British government treated the situation as an emergency. Both the devolved Northern Irish government and Westminster simply introduced emergency legislation giving the State enhanced powers in order to deal with the spiraling violence. This chapter will look at various theories that attempt to explain how governments, facing a crisis and seeking increased powers to deal with that crisis, are limited in democratic States. These theories are projected onto a stable functioning Western democracy that has an elected government, a separation of powers and a justiciable system of rights. Of course, authoritarian governments experience emergencies too but as Kim Lane Scheppele argues, 'For an executive to seize power and suspend rights under a democratic constitutional government it is an entirely different matter, normatively speaking, than for a monarch (even a constitutional monarch) to do so.'[223]

3.2 Emergencies have been called various names over time. UN Special Rapporteur, Mr. Leandro Despouy, stated that:

> The expression state of emergency encompasses the whole range of situations described by the terms 'state of siege', 'state of urgency', 'state of alert', 'state of readiness', 'state of war', 'suspension of guarantees', 'martial law', 'crisis policies', 'curfew' etc. as well as all the other measures adopted by Governments involving restrictions on the exercise of human rights beyond those properly authorised in normal circumstances.[224]

[223] Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6(5) University of Pennsylvania Journal of Constitutional Law 1001, 1005.
[224] UN Commission on Human Rights, *Question of human rights and states of emergency.*, 3 March 1995, E/CN.4/RES/1995/42, available at: http://www.refworld.org/docid/3b00efea5f.html [accessed 10 April 2018]

3.3 In his report, Mr. Leandro Despouy chose to use the expression 'state of emergency' on account of its legal precision and the extent of its current use.[225] 'The issue of emergencies is usually understood through a dichotomised world-view in which there is a normal or ordinary state of affairs and then there is an exceptional state or state of emergency.'[226]

3.4 Historically a state of emergency would have been a situation where a nation was facing internal rebellion or was put on a war footing due to the threat of an invasionon and what was being defended was the King or Queen. Kim Lane Scheppele states that an emergency 'refers to a situation in which a state is confronted by a mortal threat and responds by doing things that would never be justified in normal times, given the working principles of that State'.[227] Therefore, Kim Lane Scheppele understands an emergency to be a challenge to the State that is so grave that the State must violate its own principles to save itself. Bruce Ackerman makes the same point, 'the paradigm case for emergency powers has been an imminent threat to the very existence of the state, which necessitates empowering the executive to take extraordinary measures'.[228]

3.5 The state of exception is justified in terms of the extreme nature of the threat. Ordinary laws and human rights are suspended or eroded by the executive in order to save them. This brings to mind Robert Taber's description of a report from a United States Air Force officer in Vietnam on the destruction of Ben Tre, a Mekong Delta city of 35,000 people. The Air Force officer is reported to have said, 'We had to destroy the town in order to save it.'[229]

3.6 The problem for the State is not that it cannot win against the terrorists but that winning must be balanced against protecting and maintaining a liberal democracy and abiding by the rule of law. Paul Wilkinson made this point very eloquently saying 'Any bloody tyrant can 'solve' the problem of political violence if he is

[225] In this thesis, the expression 'state of emergency' and 'state of exception' are used interchangeably.
[226] Arthur Miller, 'Constitutional Law: Crisis Government Becomes the Norm' (1978) 39(4) Ohio Law Journal 736.
[227] ibid.
[228] Bruce Ackerman, 'The Emergency Constitution' (2004) 113(5) Yale Law Journal 1029, 1031.
[229] Robert Taber, *The War of the Flea: Guerrilla Warfare Theory and Practice* (Paladin, 1972) 11.

prepared to sacrifice all consideration of humanity and trample down all constitutional and judicial rights.' [230] Joseph Bishop makes the same point claiming that:

> No totalitarian government with a ruthless and efficient secret police, possessing unlimited powers of surveillance, censorship, arrest, interrogation, search and seize, imprisonment and execution without trial, has much to fear from dissidents – violent or otherwise.[231]

3.7 The intrinsic problem is that in a democratic State the government is constrained by law, but when faced with a situation threatening the survival of the State the government will do whatever is necessary to defeat that threat to ensure the survival of the State. This is the case even if it involves the government breaking the law. In other words, the debate focuses on the balance between liberty on the one hand and security on the other in the face of an emergency. 'The debate about the relationship between security and liberty has intensified in liberal democracies since September 2001.' [232] The debate has not just been about the trade-off between liberty and security but also about the 'the meaning of security and the power of civil liberties'.[233]

3.8 The misgivings about sacrificing fundamental rights can be split into principled misgivings and pragmatic misgivings.[234] Principled misgivings include the idea that some rights are non-derogable and that giving up these fundamental rights represents a victory for the enemy. The pragmatic objections to sacrificing

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[230] Paul Wilkinson, *Terrorism and the Liberal State* (Houndsmill: MacMillan 1986) 125.
[231] Joseph Bishop, 'Law in the Control of Terrorism and Insurrection: The British Laboratory Experience' (1978) 42(2) Law and Contemporary Problems 140, 141.
[232] Christina Pantazis, Simon Pemberton, 'Reconfiguring Security and Liberty' (2012) 52(3) The British Journal of Criminology 651; Nasser Hussain, 'Beyond Norm and Exception: Guantanamo' (2007) 33(4) Critical Inquiry 734; Lucia Zednar, 'Security and Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) Journal of Law and Society 507; Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6(5) University of Pennsylvania Journal of Constitutional Law 1001; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an age of Terrorism* (Yale University Press 2006).
[233] Claudia Aradau, 'Forget Equality? Security and Liberty in the "War on Terror"' (2008) 33(2) Alternatives: Global, Local, Political 293.
[234] Lucia Zednar, 'Security and Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) Journal of Law and Society 507, 510.

fundamental rights include the idea that once lost these rights are difficult to regain and that losing such rights is in any case at best unnecessary to combat the threat and in the worst-case scenario counterproductive.

3.9 There is some evidence from Northern Ireland to suggest that concerns that emergency legislation will remain after the emergency has ended are legitimate. As part of the security normalisation program parts of the Terrorism Act 2000[235] relating to Northern Ireland was repealed on 31 July 2007. Only to be replaced by the Justice and Security (Northern Ireland) Act 2007 that contains a provision for non-jury trials. [236] The Director of Public Prosecutions (DPP) may issue a certificate that allows a trial on indictment to proceed without a jury if certain conditions in s1 of the Justice and Security Act 2007 are met.[237] The DPP must satisfy himself that 'there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury'.[238] The fact that the non-jury trials still take place, although in falling numbers,[239] is evidence that even contentious emergency powers can prove difficult to remove after the emergency has ended.

3.10 The trade-off between liberty and security is actually more complicated than it might appear at first glance. This is because implicit in the trade-off are the numbers – national security for everyone versus civil liberties for those few who are suspected of crimes. Waldron makes the point when he claims that 'if security gains for most people are being balanced against liberty–losses for a few, then we need to pay attention to the few/many dimension of the balance, not just the liberty/security dimension'. [240] This is the case despite the fact that the improvement in security is incalculable and potentially very slight. In other

[235] Terrorism Act 2000 Part VII.
[236] Justice and Security (Northern Ireland) Act 2007 s1.
[237] ibid.
[238] ibid.
[239] The Northern Ireland Office has provided the following statistics: 2007 (113), 2008 (72), 2009 (41), 2010 (28), 2011 (23), 2012 (55), 2013 (65), 2014(63), 2015 (25), 2016 (15). See Northern Ireland Office, Northern Ireland Terrorism Legislation: Annual Statistics 2016/17 (Belfast, 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65624/2016-17_NI_Terrorism_Bulletin_PDF.PDF> accessed 6 March 2018.
[240] J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 191, 203.

words, the rights of the many are balanced against the rights of few and the interests of both the few and the many are being weighed against future uncertainties.

3.11 'One of the ironies of pursuing security is that whilst claiming to protect liberty from one source - terrorism, it diminishes the protection of liberty from another - the state.' [241] To overcome this tension, Lucia Zednar suggests that the security/liberty trade-off should be abandoned and replaced with an inter-dependency between liberty and security.[242] In other words, promoting security is not an end in itself. Promoting security involves protecting various ends and one of those ends is liberty. It is important to promote security because by promoting security, liberty is protected. Therefore, on this understanding, measures aimed to promote security but which undermine liberty ought to be reconsidered.

3.12 Since the terrorist attacks on 9/11 interest in the powers of government and the consequences of expanding executive powers has been 'revitalised'.[243] David Rudenstine has speculated that this is at least in part, 'due to the expansion of the national security state and the growing concerns that the power of the government is not meaningfully controlled by the legislature nor meaningfully held accountable by the courts'.[244] This increased interest has led to the development and refinement of various theories of emergency.

## The Evolution of the Concept of a State of Emergency

3.13 The concept of a state of emergency has evolved over time. The number of reasons used to justify declaring a state of emergency has increased and the terms involved, initially defence of the realm, and then later national security, have themselves evolved and expanded to cover many more situations.

[241] Zednar (n234) 532.
[242] ibid.
[243] David Rudenstine, 'Roman Rules for an Imperial Presidency: Revisiting Clinton Rossiter 1948 Constitutional Dictatorship: Crisis Government in Modern Democracies' (2013) 34 Cardozo Law Review 1063.
[244] ibid.

3.14 By the twentieth century the possible reasons used to justify declaring an emergency in Britain had come to include industrial action[245] and terrorism in Northern Ireland,[246] as well as the defence of the realm. The expansion of the justifications used to declare an emergency has had an impact on the concept of an emergency itself. Emergencies were originally understood as threats that jeopardised the very survival of the State but by incorporating industrial action and acts of terrorism as justifications for an emergency, the concept of an emergency is widened to include threats that do not threaten the very survival of the State but instead threaten vested interests within the State and/or the social order. This change has weakened the link between necessity and emergency.

3.15 The concept of an emergency has also been complicated by changes to the meaning of the term defence of the realm. Over time the term had widened and had come to mean defending a political community rather than just the sovereign. In other words, wars were waged not to defend the Sovereign but instead wars were waged on behalf of everyone. This shift in focus in terms of what is being defended, complicates our understanding of what constitutes a threat and what survival means.

3.16 'The expression 'national security' had not been in common use before WWII.'[247] However, in the second half of the twentieth century the term national security came to largely replace the term defence of the realm. Emergencies came to be justified on the basis of protecting national security. It has been suggested that this change in terminology reflected a shift in perception about what constitutes a threat to the State.[248] The suggestion is that 'actions far afield in the world would now count as direct threats' to the State.[249]

3.17 The problem is that the term national security is not defined in law and is consequently imprecise. So, the discussion of emergencies is further complicated by the fact that the term national security, which is used to justify an emergency,

[245] Emergency Powers Act 1920 s1(1).
[246] Prevention of Terrorism (Temporary Provisions) Act 1974 Part II s3 (3).
[247] Scheppele (n223) 1016.
[248] ibid.
[249] ibid.

is itself imprecise. What is clear is that emergencies are commonplace. Emergencies are so commonplace that some commentators have observed that emergency government has or will become the norm.[250] A UN study in 1997 concluded that 'about 100 states, or around half of the countries of the world had been under a state of emergency actual or declared, during the period between January 1985 and May 1997'.[251]

3.18 Emergencies can be legal, in the sense that they can be declared or proclaimed in accordance with constitutional or legislative provisions, or they can be de facto states of emergency. The United Nations has defined a de facto emergency as involving the adoption of exceptional measures without a state of emergency having previously been proclaimed or the maintenance of exceptional measures after a state of emergency has been officially lifted.[252] Between 1985 and 1997 at least 20 countries were at one time or another under a de facto emergency.[253] There is also what is sometimes referred to as an institutional emergency, where exceptional measures are incorporated into ordinary laws before the state of emergency is finally terminated. Proclaimed or declared emergencies have been sub-categorised as either national or international in nature. This distinction, at least in part, seems to rest on interpreting national security in a very broad sense.

3.19 The State responds to the threat in a way that would not normally be justified but it is generally understood that once the threat disappears then the laws enacted to deal with the emergency will no longer apply and the previous laws will be restored. In other words, the aim of the emergency constitution is to protect the pre-existing constitutional order. However, this understanding of an emergency is problematic in situations where the legitimacy of the pre-existing arrangements is the cause of the emergency, as was the case in Northern Ireland. In such situations, in a democratic State, the aim of introducing emergency legislation ought not to be to ensure the restoration of the old order but rather to allow the

[250] Miller (n226).
[251] UN Sub-Commission on the Promotion and Protection of Human Rights, The Administration of Justice, 23 June 1997, E/CN.4/Sub.2/1997/19 para 179 at http://www.refworld.org/docid/3b00f41d1.html [accessed 2 October 2017]
[252] ibid.
[253] ibid.

creation a new order, a new order that addresses at least some of the issues that caused the emergency in the first place.

3.20 Looking generally at emergency powers in the USA and the kinds of extraordinary measures that have been permitted by them, Sharon Pickering commented that the:

> [E]mergency powers were widely regarded as having reduced due process protections, increased police powers, boosted executive powers to unprecedented levels, while simultaneously reducing judicial oversight, eroding the once closely monitored demarcation between intelligence and security agencies on the one hand and the state and federal police services on the other.[254]

## Elements of an Emergency

3.21 The International Covenant on Civil and Political Rights was adopted by the General Assembly in the UN on 19 December 1966.[255] Article 4 of that Covenant states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[256]

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[254] Sharon Pickering, Jude McCulloch, David Neville Wright, *Counter–Terrorism Policing: Community, Cohesion and Security* (Springer-Verlag 2008) 16.
[255] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 at http://www.refworld.org/docid/3ae6b3aa0.html [accessed 2 October 2017.
[256] ibid.

3.22 An emergency must involve a threat to the life of the nation and the situation must make it necessary for a state to violate specific Covenant norms in order to maintain a minimum level of public order.

3.23 Article 15 of the European Convention of Human Rights (ECHR or the European Convention) states:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent i) strictly required by the exigencies of the situation, ii) provided that such measures are not inconsistent with its other obligations under international law.[257]

3.24 This again provides for the possibility of violating specific Covenant norms in order to maintain a minimum level of public order in times of public emergency that affects the life of the nation. The European Court of Human Rights has looked at the meaning of the phrase 'a public emergency which affects the life of a nation'. In the case of *Lawless v Ireland,* the phrase was said to mean 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is comprised'.[258] In its report on the *Greek* case, the Commission stated that:

> Such an emergency may then be seen to have, in particular, the following characteristics:
>
> (1) It must be actual or imminent.[259]
> (2) Its effects must concern the entire population.
> (3) The continuance of the organised life of the community must be threatened.
> (4) The crisis must be exceptional, in that the normal measures or restriction,

[257] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 10 April 2018]
[258] *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 para 112.
[259] In the French text the words 'imminent danger' were present but were omitted in the English version.

permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[260]

3.25 In *Brannigan and McBride v United Kingdom*[261] the European Court of Human Rights concluded that the situation in Northern Ireland amounted to an emergency that affected the life of the nation. The decision was controversial because the entire population of the United Kingdom was arguably not threatened,[262] and so the focus appears to be on the nature of the threat rather than on the level of the threat. The IRA did not have the capability to launch an attack that would prevent the State from guaranteeing a minimum level of law and order. In fact, it could be argued that threats to civilians and non-essential government targets would never normally justify recourse to emergency powers precisely because they do not jeopardise the prerequisites for legal order. The argument being that terrorism creates fear in a population rather than threatens the life of a nation. Lord Hoffman articulated this idea in *A and others v Secretary of State for the Home Department*[263] when he said, 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation.'[264] He went on to say that 'Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.'[265]

## Theories of Emergency

3.26 States of emergency can be broadly understood, in one of two ways. They can either be understood as operating outside the constitutional framework sometimes referred to as the 'sovereignty' approach[266] or inside the constitution sometimes referred to as the 'rule-of-law' approach.[267]

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[260] *The Greek Case* (1969) 12 YB 1 para 113.
[261] *Brannigan and McBride* (1992) 17 EHRR 539.
[262] Although the violence spread to the mainland on occasions, there were no bombings or other incidents in Scotland or Wales.
[263] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[264] ibid para 96.
[265] ibid.
[266] Scott P Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory Legal Doctrine and Politics' (2013) 34(3) Michigan Journal of International Law 491, 500.
[267] ibid.

3.27 The 'sovereignty' approach views the State as acting outside the constitution during times of emergency. In other words, the State is understood to be operating outside the rule of law. In an emergency, the constitution is relaxed or suspended and power shifts from the legislative and judiciary and concentrates in the executive. The executive operates outside the usual channels of government and is therefore able to by-pass constitutional procedures. Therefore, the executive can act unilaterally to address the emergency. Applying the 'sovereignty' approach Frederick Cowell has described emergency powers as being 'autonomous spheres of action separate to or beyond the law'.[268]

3.28 The question then becomes to what extent should the executive be allowed to act unilaterally and the answer to that question may be dependent on the scale of the threat facing the State. An extreme position would be to argue that it is desirable for the executive to have unlimited freedom to deal with the emergency since to limit executive powers may result in the State being overwhelmed by the threat it faces. A more moderate position would be to allow the executive greater freedom than it would otherwise have, but impose limits to those powers.

3.29 As constitutional norms are relaxed and power gravitates to the executive, there is an increased risk that the executive will abuse that power. However, that risk can be justified during an emergency on the grounds of improved national security.[269] Clinton Rossiter put it as follows, 'no sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself'.[270] An interesting feature of states of emergency understood in this way is that they originate from law. In other words, the law is used to suspend itself.

3.30 The idea that states of emergency exist outside the law is associated with the 17th

[268] Fredrick Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR' (2013) 1(1) Birkbeck Law Review 135, 137.
[269] This is precisely the trade-off that Benjamin Franklin feared when he admonished that 'those that sacrifice essential liberty in the name of temporary security deserve neither liberty nor security'.
[270] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers 2003) 314.

century philosopher John Locke[271] and the German right-wing constitutional theorist Carl Schmitt.[272] Schmitt argued that the executive needed the ability to act outside of the rules.[273] In fact, the survival of the State may depend on the executive not being bound by any rules. So, in times of emergency Schmitt conceived of the rule of law as a threat to the survival of the State. He wrote:

> The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and it is to be eliminated. The precondition as well as the conduct of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.[274]

3.31 Schmitt believed that emergencies exposed a fundamental weakness in liberalism. The law can spell out who may exercise emergency power but it cannot set out in advance what would be a necessary and permissible response to a threat and so he famously claimed that 'in an emergency, the state remains, where law recedes'.[275] However, the absence of a formal power to act cannot be allowed to inhibit the executive's ability to mount a proper defence of the community. The executive resorts to raw political power out of necessity regardless of the lawfulness of its actions.

3.32 So, Schmitt understood emergencies to be 'a suspension of regular law, even a space of non-law'[276] or as David Dyzenhaus put it 'a state of emergency is a lawless void, a legal black hole, in which the state acts unconstrained by law'.[277] Dyzenhaus also coined the term 'legal grey holes' to describe disguised legal

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[271] John Locke, *Two Treatises on Government* (Peter Laslett (ed), Cambridge University Press 1967).
[272] Carl Schmitt, Tracy Strong, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab (tr), University of Chicago Press 2010) 6-7.
[273] For a further discussion of Schmitt's theory see para 3.45-3.46
[274] Schmitt (n272) 6-7.
[275] ibid.15.
[276] Nasser Hussain, 'Beyond Norm and Exception: Guantanamo' (2007) 33(4) Critical Inquiry 734, 735.
[277] David Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2005-2006) 27(5) Cardozo Law Review 2005, 2006.

black holes. That is 'situations where there are some legal constraints on executive action - it is not a lawless void - but the constraints are so unsubstantial that they pretty well permit the government to do as it pleases'.[278]

3.33 Adrian Vermeule and Eric Posner go further and suggest that this is true not just in times of emergency but is true in general in the modern State. [279] This unconstrained power exists with respect to foreign, military and domestic matters. So, it is often said that 'in times of war, the laws are silent' but Posner and Vermeule argue that the laws are always silent when it comes to executive power. This they suggest is true of both constitutional laws and statutes that purport to regulate the executive. Posner and Vermeule state that, 'The basic aspiration of liberal legality to constrain the executive through statutory law has largely failed.'[280] When attempts are made to impose legislative constraints, the laws are often vague enough and the courts typically deferential enough to allow the executive room to maneuver. The 'laws provide an impressive façade of legal constraint on the executive, but actually blocking very little action'.[281]

3.34 Nasser Hussain argues that the problem with this view of emergencies as essentially lawless spaces is that it is at odds with what is actually seen to happen during emergencies. It may well be that there is an under regulation of emergencies at a constitutional level but there is an over regulation of emergencies at a micro-level. Hussain states that 'what we witness in contemporary global emergencies is a proliferation of new laws and regulations, passed in an ad hoc or tactical manner, and diverse administrative procedures'.[282] Hussain describes the emergence of these new laws as 'hyperlegality'. He claims that hyperlegality operates through two mechanisms. It first extends the use of classifications of individuals and then expands the use of special tribunals and commissions to deal with individuals depending on their classification category.

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[278] David Dyzenhaus, *The Constitution of Law: Legality in time of Emergency* (Cambridge University Press 2006) 3.
[279] Eric Posner, Adrian Vermeule, *The Executive Unbound: After the Madison Republic* (Oxford University Press 2011) 15.
[280] ibid 112.
[281] ibid 88.
[282] Nasser Hussain, 'Hyperlegality' (2007) 10(4) New Criminal Law Review and Interdisciplinary Journal 514.

Hussain gives examples of new classifications or labels that emerged after 9/11 including individuals of 'special interest', 'enemy combatants' and 'non-enemy combatants'.[283] He makes the point that being labeled in these ways had 'significant ramifications for the detainees'.[284] Hussain claims that conceptualising states of emergency as spheres of legal exclusion is 'inadequate to explain the use of bureaucratic and administrative classifications'.[285]

3.35 Alternatively, the 'rule-of-law' approach views emergencies as operating within the constitutional framework and in fact many constitutions have provisions for enhancing executive power during emergencies.[286] Lord Hoffman in *A v Secretary of State for the Home Department*[287] argued that emergency powers are inherent within our constitution. He claimed that 'the necessity for draconian powers in moments of national crisis is recognised in our constitutional history'.[288] So the executive alone possesses constitutionally based authority to undertake emergency action. This is because only the executive possesses the 'requisite capacity for decision, activity, secrecy and dispatch'.[289] In the 'rule-of law' approach the authority to manage an emergency is found in the constitution. It follows that this authority must be bounded by constitutional constraints.

3.36 On this understanding of emergencies as existing inside law, ordinary powers and rights are temporarily suspended, but that does not mean that executive power is unlimited. Instead it means that the emergency powers are bounded by some form

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[283] Hussain (n276) 747-748.
[284] ibid.
[285] ibid 741.
[286] For example, Article 16 of the French Constitution of 1958 authorises the President to exercise emergency powers 'when the institutions of the Republic, the Independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted'. Translated in Gisbert Flanz, Rainer Grote (eds), *7 Constitutions of the World* (Oceana Publications 2000) 6. Another example is Article 115c (2)(1)-(2) of the Grundgesetz (The German Constitution) which broadly authorises the central German government to establish public order without regard to the powers normally reserved to the states or the limitations normally imposed on military operations. Translated in Gisbert Flanz, Rainer Grote (eds), *7 Constitutions of the World* (Oceana Publications 2003) 87. Both examples are quoted in Ackerman (n226) 1039.
[287] *A and others* (n261) para 89.
[288] ibid.
[289] William Scheuerman, 'Emergency Powers' (2006) 2 Annual Review of Law and Social Sciences 259. This quote is attributed to Alexander Hamilton.

of constitutional regulation. That supervision could come from the legislature or judicial review or the people or some combination thereof. In the 'rule-of-law' approach emergencies, it is assumed that there is no prerogative attaching to any institution within the State that allows that institution to act outside of the law. It is accepted that there is a space outside of law, 'but there is no authority, inside or outside of the law, that can authorise state action outside of the law'.[290] It is the responsibility of State institutions to work together to ensure that political power is always exercised within the rule of law. Dyzenhaus refers to this as the rule of law project.[291]

3.37 In broad terms emergencies are understood as operating either inside or outside the constitution. At a more detailed level, political theorists have developed various models offering up a variety of ideas about how to understand states of emergencies. These models either attempt to explain emergency power in terms that are consistent with the rule of law and constitutionalism or examine how best judicial or political institutions can constrain emergency powers invoked by the State. Contemporary theories of emergency powers can be divided into three basic models according to the type of check on State power that they favour. The three models are the legality model, the neo-Roman model and the extra-legal measures model.[292]

**The Legality Model**

3.38 This model, also sometimes referred to as the common–law model, views emergency legislation as being integrated in ordinary law. The model focuses on the roles of the courts in scrutinising emergency legislation to ensure that it is consistent with the rule of law in a 'thick' sense. In this model, the courts are the principal institution that acts to constrain the use of executive power during emergencies. In other words, the function of the courts is to both scrutinise legislation to ensure it upholds the rule of law and to police the boundaries between the legislature and the executive in order to keep each branch within its own sphere of power.

[290] Dyzenhaus (n277) 2010.
[291] ibid 2011.
[292] Michelle Linguori, 'A New Emergency Law Model for Egypt' (2012) 19(10) Human Rights Brief 10.

3.39 The judiciary is well placed to fulfill this function for three reasons:

> [T]hey have the advantage of hindsight; they take up issues relating to emergency powers not in the abstract … but in the context of specific cases; and they are required to give reasons for their decisions thereby restricting what can be done in the next emergency.[293]

It is also arguable that judicial scrutiny takes place at a time when the 'heat' of the emergency has cooled and by judges who are not reliant on public support and therefore able to scrutinise the legislation in a more measured way.

3.40 However, this model's reliance on the courts as 'guardians' of rights and liberties during emergencies is difficult to square with the courts historical reluctance to challenge the executive once national security has been raised as a motive for any particular activity.

**The Extra-Legal Measures Model**

3.41 The extra-legal measures model accepts that the courts and the legislature have a part to play in checking the power of the executive but the principal constraint is society or the people. Oren Gross is closely associated with this model. In his extra-legal measures model, Gross states that when the executive acts without a legal basis then those actions should be performed in full view of the public and then scrutinised later either directly by the people or alternatively by the people's legislative representatives.[294] According to Gross this model best preserves fundamental principles of the constitution.[295] Gross's extra-legal measures model is based on three assumptions. Firstly, that in emergencies the executive must be enhanced. Secondly, constitutional arrangements will inevitably fail to place constraints on executive power during an emergency and thirdly, the enhanced powers used by the executive during an emergency will 'leak' into ordinary law

[293] David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 Yale Law Journal 1753.
[294] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112(5) Yale Law Journal 1011, 1097.
[295] ibid 1023-4.

after the emergency has ended.[296] Therefore, Gross accepts that in times of emergency public officials may need to act contrary to the law, but that by publicly acknowledging their acts they leave it to the people to judge them later and decide their fate.[297]

3.42 Reliance on ex-post facto scrutiny is arguably hopeful rather than realistic but it does reintroduce law back into the space of the emergency. Laws play an important part for Gross after the emergency has ended because it is through law that officials will be either punished or not. It therefore distances Gross from Locke and Schmitt who both conceive a state of emergency as entirely lawless space.

**The Neo-Roman Model**

3.43 The neo-Roman model[298] is based on the work of Schmitt.[299] Schmitt argued that the rule of law has no place during an emergency and that an emergency by its nature requires the suspension of democratic constitutional order.[300] Modern theorists who accept the neo-Roman approach have developed versions of this model that advocate well-drafted formal emergency powers clauses to be inserted in the constitution. These clauses provide prospective guidelines for the emergency authority, time restrictions and standards against which actions can be judged legal or illegal. These clauses distance the emergency law from the ordinary law and in doing so frustrate both any blurring of the boundaries between the two types of law and any seepage of emergency law into ordinary law. Clinton Rossiter[301] and Bruce Ackerman[302] are closely associated with this model and have both developed a version of this model arguing for entrenched emergency clauses in a State's constitution.

3.44 This model has the advantage of specifying how and when an emergency can be declared and forces the executive to rely on the legislature to set up an emergency

[296] ibid 1097.
[297] ibid.
[298] Modern emergency powers have their origin in Ancient Roman Law. See Linguori (n291) 10.
[299] Schmitt (n272).
[300] ibid 5-15.
[301] Rossiter (n270).
[302] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006).

government. This overcomes the troubling idea that an executive 'defines, declares and potentially gains from an emergency situation'. [303] William Scheuerman also makes the point that by making the executive reliant on the legislature, the model increases the potential for differences of opinion on what constitutes an emergency.

## The Role of Stormont during The Troubles

3.45 At the start of the Troubles Northern Ireland had its own parliament at Stormont in Belfast. The statutory basis of that parliament was the Government of Ireland Act 1920.[304] Stormont was always subservient to Westminster and in 1972, due to rising levels of violence, the British government imposed direct rule on Northern Ireland from Westminster. The Northern Ireland (Temporary Provisions) Act 1972[305] suspended or prorogued the Stormont Parliament and the Northern Ireland Constitution Act of 1973[306] abolished it a year later.

3.46 The British Army had been deployed on the streets of Northern Ireland since August 1969. The consequences of the imposition of direct rule for the military in Northern Ireland were insignificant. In fact, it was understood by civil servants at the time that the imposition of direct rule would translate into 'a slight advantage because what at present requires legislation at Stormont could be dealt with by Order in Council after it is imposed'.[307] The British Army would continue to act in its capacity as military aid to the civil power. The only new factor would be that the civil power in whose aid the British Army would be acting would now be Westminster.

3.47 Legislation currently in force in Northern Ireland would continue. Orders under the Northern Ireland Special Powers Act[308] would continue to be made by the

[303] Scheuerman (n289) 272.
[304] Government of Ireland Act 1920.
[305] Northern Ireland (Temporary Provisions) Act 1972.
[306] Northern Ireland Constitution Act 1973.
[307] The National Archive (TNA): Public Record Office (PRO) CAB 164/110 Northern Ireland Contingency Planning 'Operation Folklore' 1972 Folio 16 letter from Head of DS 6 to head of DS 10 T Sol (Mr. Hooton) dated June 1973.
[308] The Civil Authorities (Special Powers) Act (Northern Ireland) 1922. This was repealed by the Northern Ireland (Emergency Provisions) Act 1973.

Minister responsible for Northern Ireland. Legislation that would have been capable of being passed by the Stormont Parliament would become capable of being passed by Order in Council at Westminster and matters already requiring legislation from Westminster would continue to do so.

3.48 The Sunningdale Agreement[309] of 1973 attempted to reintroduce devolved power in Northern Ireland. However, the attempt failed and direct rule did not end for another 25 years with the signing of the Good Friday Agreement in 1998.[310]

3.49 The emergency legislation for Northern Ireland was enacted at Westminster where it ought to have been heavily scrutinised by Parliament. However, there are reasons to be suspicious about the level of scrutiny it received. Firstly, 'The British political parties quickly adopted a bipartisan approach to managing the conflict.' [311] This bipartisan approach taken by all the major British political parties to the conflict in Northern Ireland may have translated into limited scrutiny of emergency legislation. Secondly, as Whelan points out, at the time Northern Ireland elected 17 of the 650 Members of Parliament at Westminster.[312] He maintains that the 'limited number of Northern Ireland's representatives and the intractability of its problems give Parliament little incentive to devote attention to Northern Ireland'.[313] Bowyer Bell echoes those thoughts stating that 'except after an immediate atrocity [Ireland] remains a marginal matter in London'. [314] He went on to describe Northern Ireland as 'still a mix of the Cornwall and the Congo, charm and black violence, a faraway place, little understood, seldom visited, rarely a crucial matter in Parliament or

[309] *The Sunningdale Agreement: Tripartate Agreement on the Council of Ireland-Communique issued following the Sunningdale Conference* (9 December 1973) (The Sunningdale Agreement).
[310] *The Belfast Agreement: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Ireland* (Cm 4292,1998). There were periods after that when direct rule was again imposed on a temporary basis.
[311] Paul Dixon, ''Hearts and Minds'? British Strategy in Northern Ireland' [2009] Journal of Strategic Studies 32 (3) 445, 449.
[312] Sinn Fein's first MP Gerry Adams was elected in 1983. There were no abstentionist MPs before 1983.
[313] Leo Whelan, 'The Challenge of Lobbying for Civil Rights in Northern Ireland: The Committee of the Administration of Justice' (1992) 14(2) Human Rights Quarterly 149, 150.
[314] J Bowyer Bell, *The Gun in Politics: An Analysis of Irish Political Conflict, 1916-1986* (Transaction Publishers 1987) 212.

Westminster'.[315] Thirdly, most of the laws that would have been the responsibility of Northern Ireland's legislature were enacted through the abbreviated Order in Council procedure established by the Northern Ireland Act of 1974.[316] Orders in Council are drafted under the direction of senior government ministers and laid before Parliament for approval. However, Orders in Council are secondary legislation and as a consequence are Parliamentary debate 'is limited to no more than one–and-a-half hours, and the draft must be approved or rejected in its entirety'.[317]

3.50 What this means is that successive British governments had the opportunity to introduce emergency legislation drafted in vague terms, granting sweeping powers to the Security Forces, and have confidence that the legislation would be passed by both Houses of Parliament.

## The Emergency Legislation

3.51 In relation to an emergency the State's response to terrorism can be broadly understood as taking either a 'criminal justice' approach or a 'war approach'. The 'criminal justice' approach is heavily reliant on the State's legal framework as the main means of combating terrorism. Terrorists are arrested and processed through the justice system in the same way as any other criminal. The 'war' approach on the other hand, views the terrorists as enemies to be annihilated by military force. Taking the 'war' approach may involve suspected leaders of terrorist groups being assassinated or coming under 'targeted' air strikes. [318] In other words, States have a choice about how to respond to terrorist activities. They can either respond to acts of terrorism as large crimes or respond to them as small wars. However, 'in most cases the democratic response incorporates aspects of both models'[319] although this may not be fully admitted publicly by the State.

[315] ibid.
[316] Northern Ireland Act 1974 Schedule 1(1).
[317] Whelan (n313) 151.
[318] A recent example would be the alleged assassination of Osama bin Laden. In 2015 Seymour Hersh wrote, 'It has been 4 years since a group of Navy Seals assassinated Osama bin Laden.' See Seymour Hersh, 'The Killing of Osama bin Laden' (2015) 37(10) London Book Review 3-10.
[319] Geraint Hughes, 'The use of undercover military units in counter-terrorist operations: A historical analysis with reference to contemporary anti-terrorism' (2010) 21(4) Small Wars and Insurgencies 561, 567.

Arguably this happened in Northern Ireland because on the one hand the British government used the justice system to deal with suspected terrorists and on the other hand, behind the scenes, developed contingency plans, certain aspects of which, looked like plans for a military offensive.[320]

3.52 Britain tended to treat terrorism in Northern Ireland during the Troubles as a large crime and applied the criminal justice approach when dealing with those suspected of terrorist offences. The British government's position was that the activities of the IRA remained criminal despite their motives. This policy of criminalisation was designed to influence and shape public opinion. Finn has suggested that it was 'an attempt to persuade Northern Irish Catholics that terrorists were not heroic Irish patriots but brutal criminals'.[321]

3.53 However, taking the criminal justice approach and using the ordinary criminal law to deal with suspected terrorists was problematic. The recommendations made in the Diplock Report[322] relating to special measures were enacted in order to overcome some of the problems. The special arrangements put in place allowed the British government to maintain its position that those suspected of terrorist offences in Northern Ireland were processed in the ordinary courts whereas in fact those courts were anything but ordinary. Writing specifically about the Emergency Provisions Act 1978 Finn states that 'The Act does not merely work changes in the trial of suspected terrorists but instead restructures the *entire* criminal justice process from arrest and detention to sentencing and appeal.'[323]

3.54 Although those suspected of terrorist offences were dealt with in the criminal justice system as criminals and denied political prisoner status, they were processed under legislation that explicitly defined terrorism as 'violence for

[320] See Chapter 6 for discussion on contingency planning.
[321] John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press 1990) 49.
[322] *Report of the Commission to consider the legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, 1972). (The Diplock Report)
[323] Finn (n321) 87.

political ends'.[324] In other words, the British government simultaneously treated terrorist suspects like criminals while acknowledging that those suspected of terrorist crimes had political objectives.

3.55 During the recent Troubles the British government relied heavily on both anti-terrorist legislation and emergency powers legislation which when combined are sometimes referred to as the security legislation. The Emergency Powers Acts tended to deal with terrorists once they have been caught and the Prevention of Terrorism Acts 'supposedly perform[ed] the preventative role'.[325] The 'goal behind each of these laws was to limit or eliminate acts of terrorism'.[326]

3.56 Emergency powers were nothing new in Northern Ireland. From its creation in 1920 there was always political tension in Northern Ireland that sporadically erupted into violence. As a consequence, the Civil Authorities (Special Powers) Acts (Northern Ireland), 1922 (SPA) was enacted. The SPA was renewed on an annual basis until 1928 when it was introduced for a five-year period and it was made permanent in 1933 through the enactment of the Civil Authorities (Special Powers) Act (Northern Ireland), 1933.

3.57 The SPA was 'cast in the most sweeping terms, with a minimum of restriction in executive discretion and procedural protection for the accused'.[327] This legislation has been described as 'draconian' [328] and it has been claimed that it operated 'with a minimum of interference by the courts for most of the time'.[329] It has also been claimed that it gave such sweeping powers to the Security Forces that they enjoyed similar powers to those granted under martial law, despite the fact that martial law was never declared.[330]

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[324] The Northern Ireland (Emergency Provisions) Act 1978 s31.
[325] Brice Dickson, 'Northern Ireland's Emergency Legislation: The Wrong Medicine?' [1992] Public Law 592, 595.
[326] Michael O'Connor, Celia Rumann, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland' [2003] The Cardozo Law Review 24(4) 1657, 1662.
[327] Bishop (n231) 157.
[328] ibid 159.
[329] ibid 169.
[330] ibid 183.

3.58 The SPA also created very vague offences like s2 (4). This catchall clause stated:

> If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations.

3.59 Commenting on the SPA, Everlegh stated that s2 (4) was so vague that 'It is possible to think that merely to be a Roman Catholic in Northern Ireland would have been an offence under that section.'[331] The Cameron Commission, set up to identify the causes and nature of the violence in Northern Ireland since 1968, also commented in its Report[332] that the SPA was remarkable because of the 'width of powers given to the RUC and the Ulster Special Constabulary'.[333]

3.60 The Cameron Report also noted that certain of the powers contained in the Act were in conflict with the Universal Declaration of Human Rights (UDHR).[334] The Report gave the following examples of conflicts with the UDHR:

> In particular Article 10 (against arbitrary arrest) Article 12 (the right to be presumed innocent until proven guilty) Article 13 (against subjection to interference with personal privacy, home or correspondence) Article 20 (freedom of opinion and expression).[335]

Although the UDHR had moral authority it created no corresponding legal obligations on States, and whatever moral authority it possessed was not enough to cause the British government to review and amend its legislation. The UK also had

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[331] Robin Everlegh, *Peacekeeping in a Democratic Society: The Lessons from Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978) 117.
[332] Report of the Commission Appointed by the Government of Northern Ireland Disturbances in Northern Ireland (Cmd 532, 1969) Belfast: HMSO para 9. (The Cameron Report)
[333] The Ulster Special Constabulary or 'B' Specials was eventually disbanded in 1969 on the recommendations of the Hunt Commission which set out to restructure the RUC. The 'A' and 'C' Specials had been disbanded in 1925.
[334] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 9 January 2018].
[335] The Cameron Report (n330) para 9.

obligations under the ECHR. These obligations may also have conflicted with the SPA but they were not mentioned.[336]

3.61 The SPA gave the RUC far reaching powers including powers to authorise curfews, close down licensed premises, prohibit meetings, assemblies and processions, prohibit the wearing of badges and uniforms and restrict the circulation of any newspaper. The SPA also gave powers to the RUC to enter all land and buildings and take possession of both. It also included the power to introduce restriction and exclusion orders and authorise internment. In addition, it 'served as a model for subsequent legislation granting emergency powers'.[337] The emergency powers legislation included the Northern Ireland (Emergency Provisions) Acts of 1973, 1978, 1987 and 1996.[338]

3.62 Running in parallel with these emergency powers acts was a series of Prevention of Terrorism Acts. The first of these was introduced in 1974, with new versions enacted in 1976, 1984 and 1989, [339] and the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1976 and 1984. [340]

3.63 The Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973) came into force on the 2 April 1973 following a period of increased violence. It comprised of 31 sections and 5 schedules. Its passage through the House of Commons was not smooth but in the end, it passed by the narrowest of margins.[341] Speaking years later in the House of Commons, Ian Paisley explained that the EPA 1973 had been passed by a very narrow margin, in fact 'the Government won by one vote, a vote of a Roman Catholic'.[342]

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[336] See chapter 8 para 9.22-9.38 for a further discussion of ECHR obligations.
[337] O' Connor, Rumman (n326) 1665.
[338] Northern Ireland (Emergency Provisions) Act 1973; Northern Ireland (Emergency Provisions) Act 1978; Northern Ireland (Emergency Provisions) Act 1987; Northern Ireland (Emergency Provisions) Act 1996.
[339] Prevention of Terrorism Acts 1974; Prevention of Terrorism Acts 1976; Prevention of Terrorism Acts 1984; Prevention of Terrorism Acts 1989.
[340] Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1976; Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1984.
[341] Dickson (n325) 595. See H C Deb, November 19 1990, vol 181 col 46.
[342] ibid.

3.64 The EPA 1973 was based on the recommendations made in the report by the commission headed by Lord Diplock issued on 20 December 1972, known as the Diplock Report.[343] This Act increased the powers of the police and arguably eroded the rights of the population of Northern Ireland. Perhaps the most important provision in the legislation was the power to conduct certain trials before one judge without a jury. The Act included a list of scheduled offences that would revoke the right to a jury trial.[344] This list of offences included the murder, arson, serious violent offences against the person and property, various explosive and firearms offences, robbery and aggravated burglary using explosives or firearms or other offensive weapons, intimidation and blackmail.

3.65 According to the Diplock Report the reason for abolishing the right to a jury trial for anyone suspected of a scheduled offence was that removing the jury would remove 'perverse acquittals' by partisan juries and the intimidation of jurors by terrorist organisations. The Diplock Report failed to provide evidence of either perverse acquittals or juror intimidation by terrorist organisations. Furthermore, Lord Diplock conceded this lack of evidence in his Report.[345]

3.66 The EPA 1973 also changed the conditions under which statements made by suspects in the police station could be introduced into evidence at court. Under the common law such statements were generally excluded if those statements had been the result of 'inducement, a threat or…oppression'.[346] However, the EPA 1973 made it much easier to get incriminating evidence into court by making statements admissible so long as the accused had not been subjected to 'torture or to inhuman or degrading treatment in order to induce him to make the statement'.[347] 'Between July 1976 and July 1978 Diplock Judges heard almost 4,000 cases and in the overwhelming majority of those cases, a confession was the

[343] The Diplock Report (n322)
[344] Northern Ireland (Emergency Provisions) Act 1973 Schedule 4.
[345] The Diplock Report (n322) para 35-38.
[346] *R v Smith* [1959] 2 Q.B. 35 quoted in O'Connor, Rumann (n326) 1673.
[347] The Northern Ireland (Emergency Provisions) Act 1973 c53 6(2).

only significant piece of evidence establishing guilt.'[348] Out of those 4,000 cases Diplock Judges ruled out confession evidence in just 32 cases (less than 1%).[349]

3.67 The EPA 1973 also changed the procedures used in prosecuting scheduled offences in two important ways. Firstly, under s3 (1) bail was limited to situations where a High Court Judge was convinced that there would be no failure to surrender, witnesses would not be interfered with, and no further offences would be committed on bail. This provision had the effect of reducing the chances of being granted bail. Secondly, the new procedures reversed the burden of proof for certain scheduled offences. So, for example, anyone accused of being in possession of a firearm would be assumed to have knowledge of the possession and be required to rebut the assumption, rather than the prosecution having to prove knowledge of possession. In other words, the presumption of innocence was removed.

3.68 Another important provision in the EPA 1973 was internment, the power to detain suspects without charge or trial. Internment had existed under the 1922 Act but Lord Diplock in his Report had recommended some amendments to internment and these were incorporated into the EPA 1973. Detention without charge would be allowed under s10 of the Act on certain conditions set out in the Act. Every case was put before the Secretary of State, who based on the evidence provided by the Security Forces, could issue an interim custody order for 28 days. At the end of the 28-day period the suspect would be freed unless his case had been referred to a 'Commissioner' 'for determination'. One week before the determination hearing the suspect would be informed of the allegations that had been made. The suspect was also provided with legal representation. However, the hearing did not resemble a judicial hearing. Not all evidence was heard in open court. On some occasions the Commissioner heard evidence that was not heard by the accused and his lawyers. Clearly, without knowing the evidence against the suspect, the lawyer would not be in a position to advise on plea nor mount a proper defence.

3.69 The Gardiner Report noted that the standard of proof applied by the

[348] Finn (n321) 105.
[349] ibid.

Commissioners was 'a very high degree of probability'.[350] Once that standard of proof had been met then the Commissioners were 'satisfied' and the suspect was further detained. 'A very high degree of probability' is arguably lower than 'beyond reasonable doubt' the standard used in criminal proceedings.

3.70 The EPA 1973 also permitted members of the British Army or the RUC to stop and question anyone to find out their identity, their movements and knowledge of terrorist activities. Failure to provide the relevant information was itself another offence. In other words, the right to silence was removed in relation to identity, recent movements and knowledge of terrorist activity. The Act also gave members of the Armed Forces the authority to enter and search anywhere that they suspected was linked to terrorism or for 'the preservation of the peace'.[351]

3.71 The Northern Ireland (Emergency Provisions) Act 1978[352] (EPA 1978) went further and authorised the RUC to arrest and detain suspects for 72 hours.[353] Finn claims that in 'practice, the RUC cautioned its officers not to tell suspects they could see a solicitor'.[354] The Bennett Report confirmed that 'solicitors are not in practice admitted to see terrorist suspects before they are charged'.[355] This remained the case until 1992. Government statistics show that for the first time in 1992 most requests for a solicitor were granted.[356]

3.72 The EPA 1978 Act states that 'Any constable can arrest without a warrant any person whom he suspects is a terrorist.'[357] Terrorism was defined in s31 of the EPA 1978 as the 'use of violence for political ends'. Finn makes the point that the

[350] *Report of the Committee to Consider, In the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd 5847, 1975) para 126. (The Gardiner Report)
[351] The Northern Ireland (Emergency Provisional) Acts of 1973 s17.
[352] Northern Ireland (Emergency Provisions) Act 1978.
[353] The Northern Ireland (Emergency Provisions) Act 1978 s11.
[354] Finn (n321) 89.
[355] *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Cmnd 4797, 1979) para 123. (The Bennett Report)
[356] Northern Ireland Office (NIO), Research & Statistical Bulletin, Statistics on the Operation of the Prevention of Terrorism Acts, Northern Ireland 2000 6 (Belfast 2001) Table 12.
[357] The Northern Ireland (Emergency Provisions) Act 1978 s11(1).

'breadth and vagueness of the offence substantially impeded the ability of suspects to challenge the legality of the arrest through habeas corpus proceedings'.[358] In fact, the level of vagueness would arguably preclude a review by any independent body unless the good faith of the arresting officer was being challenged.[359] The suspicion need not be that the suspect has committed a terrorist offence but could be that he is involved in some indirect way, for example, training people for the purpose of terrorism or involved in some other preparatory activity. Furthermore, the suspicion need not be reasonable. All the officer was obliged to do was inform the suspect that he had been arrested under s11 as a suspected terrorist.

3.73 The House of Lords ruled that merely being told to affect an arrest by a superior officer 'was cause enough to give the arresting officer a reasonable suspicion'.[360] This led Kevin Boyle and others to conclude that 'The RUC, therefore, was in a position to block judicial review of the arrest power by using the single expedient of a superior telling a subordinate that an individual was suspected of being a terrorist and instructing him to arrest him.'[361]

3.74 The Bennett Committee concluded that the RUC used s11 powers in 90% of arrests under the emergency legislation.[362] It went on to confirm that 66% of those detained under s11 were subsequently released without charge.[363] This suggests that s11 was used to arrest suspects where the evidence was weak. Finn claims the suspects were later re-arrested and then charged under a scheduled offence. He alleges that arrests under s11 were made in order to gather intelligence that could then be used to arrest either that suspect or other suspects later.[364]

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[358] Finn (n321) 88.
[359] ibid.
[360] *McKee v The Chief Constable for Northern Ireland* [1985] 1 All ER 1.
[361] Kevin Boyle, Tom Hadden, Colm Campbell, 'Emergency Law in Northern Ireland: The Context' in Anthony Jennings (ed), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto Press 1988) 33.
[362] The Bennett Report (n355) para 70.
[363] The Bennett Report (n355) Appendix 1.
[364] Finn (n321) 89.

3.75 Finn concludes that s11 of the EPA 1978 'violated elemental constitutional principles by allowing state officials to exercise power on the basis of no reason or upon reasons that are arbitrary or capricious'.[365] In its 1981 report, Amnesty International also raised concerns about the alleged abuses of the extended powers of arrest and detention.[366] The report cites the case of Martin Lynch in which the Lord Chief Justice Lowry in 1981 rejected any judicial responsibility to provide a remedy of *habeas corpus* even against what he described as 'unacceptable but ostensibly lawful exercise of the powers of arrest'.[367] His remarks referred to the repeated arrest and detention by police of the same individual on the same suspicion, without bringing any charges. The Amnesty International report concluded that 'There was no effective remedy against arbitrary use of the emergency powers of arrest and detention by the police - contrary to international law.'[368]

3.76 The emergency powers of the 1970s eroded many civil liberties including 'freedom from self-incrimination, freedom from arbitrary arrest and detention, presumption of innocence and trial by jury'.[369] Claire Palley concluded that the result of the SPA [370] was that 'when taken in conjunction with the existence of the Special Constabulary [then 44,000 men] was that apart from military courts, the Government enjoyed similar powers to those current in time of martial law'.[371] Although Palley was writing about emergency legislation in Northern Ireland in the 1920s her comments could arguably have been made about the 1970s.

3.77 There is evidence that the British Army and RUC misused the security legislation in two ways. First, it was used to target the Roman Catholic community. This was acknowledged in the Gardiner Report of 1975 where it was recognised that,

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[365] ibid 92.
[366] Amnesty International Report 1981 (London, Amnesty International Publication 1981) 338 (Amnesty Report 1981).
[367] ibid.
[368] ibid.
[369] Finn (n321) 54.
[370] Civil Authority (Special Powers) Act (Northern Ireland), 1922
[371] Claire Palley, 'Evolution, Disintegration and Possible Reconstruction of the Northern Irish Constitution' (1972) 1(3) Anglo-American Law Review 368, 400

'proscription is distinctly uneven in Northern Ireland.[372] There are terrorist organisations which are not proscribed, but whose 'members perpetrate intimidation, violence and sectarian murder'.[373] Those comments were made in relation to Loyalist paramilitary organisations, such as the UDA that was not proscribed until 10 August 1992. The Security Forces considered the organisation a terrorist organisation and more than 100 of its members had been sent to jail for murder.[374] This is confirmed in the de Silva Report that states that 'the UDA in the late 1980s were to all intents and purposes a terrorist group'.[375]

3.78 Second, the security legislation was used to combat normal crime rather than terrorist related crime. The numbers of people arrested under the security legislation was large. Under the Prevention of Terrorism Acts[376] and the Prevention of Terrorism (Temporary Provisions) Acts,[377] the number of people arrested between November 1974 and February 2001 was 22,282.[378] Between 1975 and 1987, the Security Forces arrested a further 44,705 people under the Northern Ireland (Emergency Provisions) Acts.[379] However, government statistics show that most of those arrested were never charged and of those that were charged, most were not charged with offences listed under the Acts. For example, of those arrested under the Prevention of Terrorism Acts, only between 1-2% were charged with a criminal offence under those Acts and 73% of those arrested were not charged with any offence at all.[380]

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[372] The Gardiner Report (n350) para 24-25.
[373] ibid.
[374] David McKittrick, 'Growing violence prompts UDA ban' *The Independent* (London, 10 August 1992) www.independant.co.uk/news/growing-violence-prompts-uda--ban-david-mckittrick-reports-on-an-anomoly-under-which-a-legal-1539770.html accessed 17 March 2017.
[375] Desmond de Silva, *The Report of the Patrick Finucane Review* (HC 802-11, 2012) para 25.10 (The de Silva Report).
[376] Prevention of Terrorism Acts 1974; Prevention of Terrorism Acts 1976; Prevention of Terrorism Acts 1984; Prevention of Terrorism Acts 1989
[377] Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1974; Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1976; Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1984; Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) 1989.
[378] O' Connor, Rumann, (n326) 1681.
[379] Under the EPAs the Army arrested 30,492 people and the RUC arrested 14,213.
[380] O' Connor, Rumann (n326) 1682.

3.79 The claim is that instead of being used to combat terrorism the legislation and the expanded powers were used to combat 'normal' crime.[381] The political authorities failed to act to limit the inappropriate use of these powers. In fact, it has been suggested that the Secretary of State granted extensions to the detention of suspects under the Acts as a matter of routine. In 1997 for example there were 72 applications for an extension and all 72 were granted.[382] The implication being that the use of the legislation was not scrutinised effectively, giving a 'green light' to its continued misuse. Allegations of abuse under the Acts were investigated by the RUC before 1987, arguably providing little basis for faith in the system. After 1987 complaints were reviewed by the Independent Commission for Police Complaints (ICPC) but based on the original investigation by the RUC officer. 'During the years 1993-96, there were 1,118 allegations of misconduct by RUC officers made by people arrested under the Acts. … Yet the ICPC did not sustain a single one of these allegations'.[383] This statistic is unlikely to have inspired confidence in the system and Brice Dickson described it as 'difficult to believe'.[384]

3.80 The way in which the security legislation was introduced and the bi-partisan approach taken by all the major political parties meant that the British government was allowed to enact vague legislation giving considerable powers to the Security Forces operating in Northern Ireland. One consequence of this was that allegations of abuse were very difficult to pursue through the courts. The security legislation also made sweeping changes to the justice system. Amnesty International claims that these changes put the United Kingdom in breach of international law in relation to the powers of arrest and detention.[385] There is also evidence that the Roman Catholic population were targeted under the security legislation[386] and that the legislation was used to combat 'normal' crime rather than terrorist activity.

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[381] ibid.
[382] O' Connor, Rumann (n326) 1685.
[383] ibid.
[384] Brice Dickson, 'Complaints Against the Police' in Brice Dickson (ed), *The CAJ Handbook: Civil Liberties in Northern Ireland* (Committee for the Administration of Justice 1990) 96.
[385] Amnesty Report 1981 (n366) 338.
[386] The Gardiner Report (n350) para 24-25.

3.81 It is because of these failings that some commentators[387] have suggested that the security legislation tended to undermine the legitimacy of the British government. In other words, the security legislation tended to serve as another dimension to the conflict, providing another stage on which the two sides could do battle. It has also been suggested that it did not thwart terrorist activity but instead acted as a marshaling device for the IRA and consequently contributed to the violence.[388]

3.82 The next chapter examines further the extent to which perceived illegality and discrimination fueled the conflict and also examines the constitutional basis of the British Army acting as military aid to the civil power.

[387] Simon Prince, Geoffrey Warner, 'The IRA and Its Rivals: Political Competition and the Turn to Violence in the Early Troubles' (2013) 27(3) Contemporary British History 271, 276; Courtney Prisk, 'The Umbrella of Legitimacy' in Max Manwaring (ed), *Uncomfortable Wars: Toward a New Paradigm of Low Intensity Conflict* (Westview Press 1991) 69.

[388] Please see chapter 3 para 4.53 for a more detailed discussion of the idea of the security legislation creating a 'backlash'.

## Chapter 3: The Constitutional Position of the British Army in Northern Ireland during The Troubles

4.1 As a consequence of the rising violence in 1969 the British Army was deployed to Northern Ireland in a role referred to as military aid to the civil power. This chapter will examine the constitutional basis of the British Army in Northern Ireland. It will first look at the relevant constitutional principles governing the suppression of internal civil unrest and then see to what extent those principles governed the actions of the military as a whole.

4.2 In acting as military aid to the civil power British Army soldiers did not acquire the legal status of special constables. The position of soldiers is made very clear in an advice note from the Treasury Solicitors Department in 1973. That note stated:

> A member of the armed forces makes himself subject to his code of military law and has obligations at all times to obey the lawful commands of his superior officer. A Special Constable when sworn in makes himself subject to another code and to the commands of the force into which he is sworn. It is the view of the Treasury Solicitor that no man can in logic be made subject to both of these codes at the same time. In the case of a conflict of orders, he would not know which one to obey and would theoretically be liable to suffer as a result of disobedience to the one he disregarded this seems constitutionally unsound.[389]

4.3 The British Army in Northern Ireland faced two distinct, although related, security problems. The first was a terrorist campaign by the IRA[390] whose aim was for Northern Ireland to be absorbed into the Republic of Ireland. The second problem was a low-level sectarian 'civil war' waged between the Roman Catholic

[389] The National Archive (TNA): Public Record Office (PRO) CAB 164/110 Northern Ireland Contingency Planning 'Operation Folklore' 1972 Folio 16. Head of DS 6 to head of DS 10 T. Sol (Mr. Hooton) dated June 1973. (TNA Operation Folklore 1972 Folio 16).
[390] This includes the Provisional Irish Republican Army (PIRA) and the other various splinter groups.

and Protestant communities. This second problem took the form of street disorder 'ranging from minor 'aggro' to major riots'.[391]

4.4 The British Army's objectives were to contain terrorist activity on the one hand, and on the other, maintain law and order and suppress outbreaks of violence between the two communities. If the Army could achieve both these aims then it would 'promote conditions that would lead to a negotiated settlement between the British government and the Republicans'.[392] British government documents make it clear that the British objective was to force both political factions to realise the necessity for a political solution. [393] In dealing with both these security issues the British Army operated under a legal framework that comprised of constitutional principles, emergency legislation, ordinary criminal law, civil law,[394] international law, in addition to military law.[395]

4.5 Robin Evelegh claimed that:

> There is no substantial disagreement between the main law books, the leading cases, or the latest parliamentary report on the matter, which was in 1908 about the constitutional principles that govern the military in the suppression of internal disorder.[396]

He suggests the best place to find the law on suppressing civil disorder as it effects the military is Part II, V of the Manual of Military Law 1968.[397]

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[391] Robin Evelegh, *Peace Keeping in a Democratic Society: The Lessons learned from Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978) 76.
[392] Geraint Hughes, 'The use of undercover military units in counter-terrorist operations: A historical analysis with reference to contemporary anti-terrorism' (2010) 21(4) Small Wars and Insurgencies 561, 571.
[393] TNA Operation Folklore1972 Folio 16 (n387).
[394] This includes coronial law since following an inquest, a civil case may be brought for damages in tort and this will be looked at in chapter six. If the use of force results in physical harm or death then the tort could be negligence or trespass.
[395] Military law is sometimes viewed as a type of law outside ordinary law and separate from the rest of UK legislation enacted at Westminster. However, this is not the case as military law had as its basis the Army Act 1955, later amended by the Armed Forces Act of 1969 and 1971. These were enacted by Parliament and can be amended like any other act of Parliament.
[396] Evelegh (n391) 8.
[397] ibid.

4.6 The Manual on Military Law summarises the position as follows:

> There is, however, nothing to compel a military commander to seek permission before answering a request for military support.
>
> The common law, which governs soldiers and other citizens alike, imposes two main obligations in such cases, which are first, that every citizen is bound to come to the aid of the civil power when the civil power requires assistance to enforce law and order and, secondly, that to enforce law and order no one is allowed to use more force than is necessary.
>
> When called to the aid of the civil power soldiers in no way differ in the eyes of the law from other citizens …
>
> Even though the civil authority should give directions to the contrary the Commander of the troops, if it is really necessary, is bound to take such action as the circumstances [of civil disorder] demand.[398]

4.7 The Manual of Military Law makes it clear that a soldier, like any other citizen under the common law, has the right and duty to intervene to suppress civil disorder. The traditional view is that the soldier is merely a citizen in uniform and consequently has no additional legal powers over those possessed by any civilian. The soldier, like every other citizen, is expected to determine what action to take in order to suppress civil disorder and answer for those actions before a court at a later stage. The common law imposes two obligations on citizens (and soldiers) in civil disturbance. The first is that every citizen must support the civil power if the civil power requires assistance. The second is that no one can use more force than is necessary. Individual soldiers have a duty to obey the orders of superior officers only in so far as they do not conflict with the duties of a citizen. In other words, although soldiers are subject to two legal systems, the civilian and the military, obligations created by the civil law prevail over obligations created under military law.

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[398] *Manual of Military Law*, Part II, Employment of Troops in Aid to the Civil Power, 1968 Army Code No. 14470 V quoted in Evelegh (n391) 8.

4.8 This position was treated as settled and confirmed by Lord Diplock in *Albert v Lavin*. Lord Diplock stated that:

> Every citizen in whose presence a breach of the peace is being or reasonably appears to be about to be committed has the right to take reasonable steps to make the person…refrain from doing so… At common law this is not only the right of every citizen, it is also his duty although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.[399]

4.9 Assuming Lord Diplock was correct, Peter Rowe has argued that this would mean that 'a failure to act [to suppress civil disorder] would be a criminal offence on the part of the citizen (and soldier)'.[400] The legal obligation on the soldier would prevail despite 'orders from anyone from the Prime Minister to a senior policeman on the spot telling him not to'.[401] In other words, at a constitutional level the military are responsible to the law and are not responsible to Ministers of State or the police. The British Army cannot be put under the control of 'any civil authority with an absolute duty to obey their orders, short of an Act of Parliament specifying it'.[402] A senior military officer at the scene of a disturbance is not controlled by the government but must decide for himself what to do. The soldiers act on the orders of the military commander on the spot who is answerable in the civilian courts for his actions at some time in the future.[403]

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[399] *Albert v Lavin* [1982] AC 546, 565 B-C.

[400] Peter Rowe, 'Legal Aspects of the Use of the Army in Maintaining Order' (1987) 26 military law and law of War Review 554

[401] It has been argued that a soldier, as a public servant, holds a further duty and not to act to suppress civil disorder would amount to the offence of misconduct in public office. See Evelegh (n391) 8.

[402] Evelegh (n391) 13.

[403] The police in the United Kingdom have essentially the same legal status as the soldier when deployed to suppress civil violence. This is despite the police officer having taken an oath to uphold the law and the soldier having taken no such oath. They are in not recognised in law as being different from the rest of society. They have many additional duties placed upon them by legislation but under the common law policemen are understood to be a person 'paid to perform, as a matter of duty, acts which if he were so minded, he might have done voluntarily'. So, the police, like the military, are under a duty to perform certain duties even if the Prime Minister asks them not to. An Irish case of *Miller v Knox* [1838] 132 ER 910 established that the police, and by analogy the military, must disobey an order by the executive not to enforce the law. See Evelegh (n391) 9.

4.10 Evelegh speculated that this is at odds with what the general population believes the situation to be. Evelegh suggested that:

> It is very probable that the majority of the private citizens, policemen and soldiers believe that, when civil disorder has to be suppressed in the United Kingdom, the Army has to obey the orders of the Government and that the civil authority responsible for keeping the peace is the Police. They would undoubtedly also say that the Army would operate in suppressing civil disorder in support of and under the command of the Police, and that soldiers could not operate independently.[404]

4.11 In terms of constitutional theory, at times of civil unrest, the local magistrate, in his role as local Minister for the Crown, could call upon the British Army to come to the aid of the civil power to help restore order.[405] In by-gone days identifying the magistrate would have been straightforward but in the modern world that position no longer exists. The modern view tends to treat the Chief Police Officer as the magistrate.[406] The civil power is the authority responsible for preserving the peace and has control of the police. In Northern Ireland, the Chief Police Officer of the Royal Ulster Constabulary (RUC) would therefore have been the magistrate. Consequently, a request from him to the British Army for help to restore law and order ought to have brought the British Army onto the streets of Northern Ireland.

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[404] Evelegh (n391) 15.

[405] What is more, if a magistrate failed to call upon military units when faced with civil unrest that was out of control then the magistrate could be charged with the criminal offence of neglect of duty. See *R v Pinney* (1832) 5 Car & P 254.

[406] Robert Mark, 'Keeping the Peace in Great Britain: The Differing Roles of the Police and the Army' in Peter Rowe, Christopher Whelan (eds), *Military Intervention in Democratic Societies* (Croom Helm 1985) 90.

4.12 The Manual of Military Law[407] defines various different levels of civil unrest graduating in seriousness from unlawful assembly[408] through to riot[409] and then insurrection.[410]

It states that:

> An unlawful assembly is an assembly which may reasonably be apprehended to cause danger to the public peace, through the action of the persons constituting the assembly. As soon as violence is perpetrated it becomes a riot; while if the act of violence be one of a public nature, and with the intention of carrying into effect any general political purpose, it becomes an insurrection or rebellion, and not a riot.[411]

It would seem to follow that at least on some occasions during the Troubles the British Army was attempting to contain an insurrection rather than disperse a riot.

4.13 Military law allows all necessary measures to be taken for dispersing or otherwise putting an end to unlawful assemblies, riots and insurrection.[412]

> The degree of force that can be used in effecting the dispersion of the crowd is only so much force as is sufficient to affect the objective. In relation to

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[407] War Office, *The Manual of Military Law* (London, HMSO 1914) <https://www.slideshow.net/oldcontemptible/manual-of-military-law-1914> accessed 14 October 2017 [*The Manual of Military Law*].

[408] ibid 216. An unlawful assembly is defined as 'any meeting whatsoever of great numbers of people with circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the King's subjects, as where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. The commission of an act of violence by any one or more of those assembled is not necessary to make the assembly unlawful, if it's character and circumstances are such to be calculated to alarm, not only foolish or timid people, but persons of reasonable firmness and courage.'

[409] ibid 217. A riot is defined as 'a tumultuous disturbance of the peace by three or more persons assembling together of their own authority with an intent mutually to assist one another against any who oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people.'

[410] ibid 218. An insurrection is defined as 'involving an intention to 'levy war against the King' as it is technically called; or otherwise to act in general defiance of the government of the country.' It also states that 'insurrection almost always involves murder or attempts at murder.

[411] ibid.

[412] ibid 219.

> unlawful assembly the military can command the crowd to go away and to arrest them if they do not disperse.[413]
>
> In the case of a riot deadly weapons ought not to be employed against the rioters unless they are armed, or are in a position to inflict grievous injury or on the point of committing, some felonious outrage, which can only be stopped by armed force.[414]

4.14 In dealing with an insurrection the army has the right to resort to lethal force as soon as the 'insurgents show an intention to use violence, and it becomes apparent that immediate action by the use of arms is necessary'.[415] And it is for the military on the spot to determine what level of violence is occurring. So, the constitution places a duty on the military to act to suppress internal civil unrest and military law provides guidance as to what level of force can be used to deal with the disturbance.

4.15 The chain of events that led to the deployment of the British Army on the streets of Northern Ireland, in its role as 'military aid to the civil power', are as follows. The first request for military assistance was made on 3 August 1969 but on that occasion no troops were deployed.[416] The request from the Commissioner of Police, Mr. Wolseley, had met with resistance from the Northern Ireland government who feared that the position of the Stormont government would be threatened by the deployment of British troops.[417] This original request was withdrawn two days after being made in order to allow the General Officer Commanding in Northern Ireland (GOC NI) to freely use his common law powers.[418]

4.16 Mr. Wolseley made a second request on the 15 August 1969 and troops were deployed that day. However, the British government had contemplated the need to

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[413] ibid 223.
[414] ibid 224.
[415] ibid 221.
[416] Evelegh (n391) 6.
[417] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 6.
[418] Report of the Tribunal of Inquiry *Violence and Civil Disturbances in Northern Ireland Report* (Cmnd 566, 1972) para 19 (The Scarman Report).

send in troops some months earlier in April of that year. The Northern Ireland and Westminster governments discussed how the GOC NI should respond to a request by the Inspector–General of the RUC for assistance to suppress civil disorder. They concluded 'that the General Officer Commanding should only consider the question after consultation with London and again it was understood that there would be consultation at government level'.[419]

4.17 On the evening of the 14 August 1969 the Prime Minister of Northern Ireland, Major James Chichester-Clark, announced that he had recalled the Northern Ireland Parliament and that the 'B' Specials would be called up and ordered to report immediately for duty. By doing so he signaled the possibility that the British Army might be requested to come to the aid of the RUC. This was because if all the police reserves (including 'B' Specials) had been committed, and still the violence could not be contained, then clearly military assistance would be necessary.

4.18 At 4.30a.m. on the 15 August 1969 the Police Commissioner for Belfast, Mr. Wolseley, asked Lieutenant-Colonel J. Fletcher, Commanding Officer of the 2nd Battalion, The Queens Regiment, for military assistance.[420] At 4.45a.m. the Inspector-General of the RUC, Anthony Peacock, signed the official request for the British Army to come to the aid of the civil power.[421] At 12p.m. Anthony Peacock called a meeting of the Security Committee.[422] The direct request for military aid was then referred to the Northern Ireland Cabinet.[423] At 12.25p.m. Major James Chichester-Clark, the Northern Ireland Prime Minister, authorised his Home Affairs Minister, Robert Porter, to request deployment of troops to Derry from the Home Office in London.[424] Harold Wilson, the then Prime Minister, took the decision to put troops on the streets of Derry, and then subsequently Belfast.

[419] ibid para 20.
[420] Evelegh (n391) 6.
[421] Hamill (n417) 6.
[422] ibid.
[423] ibid.
[424] Evelegh (n391) 7.

4.19 The British government ordered the GOC NI to deploy troops in Derry at 3.10p.m. on the 15 August 1969.[425] At the same time the GOC NI received a formal request from the Inspector-General of the RUC, Anthony Peacock, to deploy troops. This was because it was understood that the 'common law required the request for military assistance to come directly from the police authorities'.[426] The fact that the request for military assistance followed two discrete pathways suggests that those involved were not clear which arrangements should be followed. At 3.45p.m. inter-sectarian shooting began.[427]

4.20 In Westminster, James Callaghan, the Home Secretary told MPs:

> The General Officer Commanding Northern Ireland [GOC NI] has been instructed to take all necessary steps, acting impartially between citizen and citizen, to restore law and order... troops will remain in direct and exclusive control of the GOC, who will continue to be responsible to the United Kingdom Government…[428]

4.21 At 6.30p.m. troops were deployed but according to Evelegh troops did not arrive at the right place, Cupar Street, the front line between Protestants and Roman Catholics until 9.35p.m.[429] It has been argued that the reason for delay in deploying the troops was that senior officers wanted more time spent on reconnaissance.[430] 'By the time the Queens Regiment arrived on the 15, [August] eight people had been killed and 100s injured and left homeless.'[431] The delay meant several hundred more burnt houses and several deaths.[432] The Scarman Report gave an alternative explanation and blamed the delay on confusion and

[425] Evelegh (n391) 7.
[426] Peter Rowe, 'Legal Aspects of the Use of the Army in Maintaining Order' (1987) 26 Military Law & Laws of War Review 551, 552.
[427] Evelegh (n391) 7.
[428] Hamill (n417) 7.
[429] Evelegh (n391) 7.
[430] Rod Thornton, 'Getting it Wrong: The Crucial Mistakes Made in the Early Stages of the British Army's Deployment to Northern Ireland (August 1969 to March 1972)' (2007) 30(1) Journal of Strategic Studies 73, 75
[431] Andrew Sanders, Ian Wood, *Times of Troubles: Britain's War in Northern Ireland (*Edinburgh University Press 2012) 4.
[432] Thornton (n430) 76.

misunderstanding of the procedures for civil authorities to obtain military assistance.[433]

4.22 The following statistics convey, to some extent at least, the level of violence and destruction that the Security Forces must have been facing. By the end of the weekend 10 people had died, 1,600 had been injured, 170 homes had been destroyed, 16 factories had been gutted by fire and the total cost of the damage was estimated at around £8 million. [434] 'In August and September 1969 some 3,500 homes had to be evacuated, 85 per cent of which belonged to Catholic families.'[435]

4.23 A meeting was held at 10 Downing Street[436] on the evening of the 19 August 1969 and after a six-hour discussion the British government issued the following communiqué:

> In a six-hour discussion the whole situation in Northern Ireland was reviewed. It was agreed that the GOC [General Officer Commanding] Northern Ireland will with immediate effect assume overall responsibility for security operations. He will continue to be responsible directly to the Ministry of Defence but will work in the closest co-operation with the Northern Ireland Government and the Inspector-General of the Royal Ulster Constabulary [RUC]. For all security operations, the GOC will have full control of the deployment and tasks of the [RUC]. For normal police duties outside the field of security the [RUC] will remain answerable to the Inspector-General who will be responsible to the Northern Ireland Government.

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[433] The Scarman Report (n418) para 19.
[434] Hamill (n417) 21.
[435] John Darby, *Conflict in Northern Ireland* (Gill & Macmillan 1976) 43.
[436] This meeting took place between the Prime Minister, Mr. Harold Wilson, the Secretary, Mr. Michael Stewart, the Home Secretary, Mr. James Callaghan, the Secretary of State for Defence, Mr. Denis Healey, and the Minister of State at the Home Office, Lord Stonham, and the Prime Minister of Northern Ireland, Major Chichester-Clark, the Deputy Prime Minister, Mr. J. L. 0. Andrews, the Minister of Home Affairs, Mr. R. W. Porter, and the Minister of Development, Mr. Brian Faulkner.

> The GOC will assume full command and control of the Ulster Special Constabulary for all purposes including their organisation, deployment, tasks and arms. Their employment by the Northern Ireland Government in riot and crowd control was always envisaged as a purely temporary measure. With the increased deployment of the Army and the assumption by the GOC of operational control of all the security forces, it will be possible for the Special Constabulary to be progressively and rapidly relieved of these temporary duties at his discretion, starting in the cities. The question of the custody of Special Constabulary arms will similarly be within his discretion. Consideration will be given to the problem of country areas and the defence of vital public service installations.[437]

4.24 'In short the General Officer Commanding became the Director of Operations for Northern Ireland.'[438] It is clear from this communiqué that the British Army is understood to be an instrument of the British government and not as independent officers of the law aiding the civil power. An Army lawyer commented that 'Whatever the theory, in practice the GOC is controlled by his political masters.'[439]

4.25 The gulf between theory and practice explains the fact that the night before the RUC asked the British Army for assistance, the Deputy Inspector-General of the RUC, Graham Shillington, stood in the shadows on the edge of the Bogside with Lieutenant-Colonel Todd, Commanding Officer of the Prince of Wales Own Regiment, one of the Province's three garrison battalions, and watched the fighting and the overthrow of the police.[440] Todd was not in uniform but he gave advice to Shillington about the use of CS gas,[441] also known as tear gas, to

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[437] *Text of a Communiqué and Declaration issued after a meeting held at 10 Downing Street on 19 August 1969* (The Downing Street Declaration) (Cmnd 4154, 1969) <http://cain.ulst.ac.uk/hmso/bni190869.htm> accessed on 17th April 2017.
[438] David Charters, ''Have a go': British Army /MI5 Agent Running Operations in Northern Ireland, 1970-1972' (2013) 28(2) Intelligence and National Security 202, 205
[439] Hamill (n417) 26.
[440] ibid 3.
[441] 2-chlorobenzalmalononitrile (also called o-chlorobenzylidene malononitrile; chemical formula: $C_{10}H_5ClN_2$).

incapacitate the rioters.[442] The point is that he did not deploy his men to help disperse the rioters despite the clear need for his assistance.

4.26 Evelegh's analysis of this, and it is hard to disagree, is that 'Ministers must have therefore ordered the Army to ignore the law and to accept the overthrow of the civil authority by riot.'[443] Evelegh continues, 'thus was made a mighty breach in the doctrine of the rule of law and the constitution as a firm framework for the control of the military engaged in the suppressing of civil disorder'.[444]

4.27 The disparity between theory and practice is important not just because it breaches the rule of law. It is important because it has the potential to cause delays in military responses to requests for assistance, as arguably it did on 15 August 1969 and that delay could potentially cost lives. It is also important because if the chain of command is that the military take orders from the Cabinet, and the existence of the vital link in the chain between the military and the Cabinet is not acknowledged in law, then how is it possible to challenge decisions taken by members of the Cabinet?

4.28 Normally, members of the public can challenge decisions made by the government in a court of law. The courts will look to see if the government decision was made within the rules as laid down under legislation or at common law and then assess whether the decision was reasonable in the circumstances. However, the courts do not recognise the right of government Ministers to give the military orders. Government Ministers can use their prerogative powers to order troops to the scene of a riot or insurrection but they cannot then issue an order for the military not to suppress civil unrest, nor can they issue orders to the military on how to enforce the law at the scene of the disturbance. On this basis, the courts may find that the orders given to the military by Ministers were not really orders at all. Similarly, Parliament would face the same difficulties if it sought to challenge orders given to the military by the Cabinet since the Cabinet does not have the constitutional powers to give such orders. In other words, the

[442] Hamill (n417) 4.
[443] Evelegh (n391) 22.
[444] ibid.

military is being controlled within a system that has not been legally formalised and therefore is not acknowledged in law and has no limits.

4.29 On the one hand, this situation increases the possibility of abuse but on the other it removes a layer of protection from the government that the law can provide. The government can no longer distance itself from how the law is enforced by claiming that law and order operations are the responsibility of the military and that the military is simply enforcing the law of the land because the government clearly has the power to control the military.

4.30 The disparity in this case between theory and practice is also important because it increases the risk of creating an unpredictable legal system for all those involved including the general public, those instigating civil unrest and the Security Forces. The problem is that if Ministers control what laws are enforced by the military and when they are enforced, then there is a risk they will do so with one eye fixed on public opinion and the pressures created by the democratic process.

4.31 There is evidence of an unpredictable legal system or flexible legal system evolving in Northern Ireland during the Troubles. This idea is also sometimes referred to as the military operating in low profile.[445] In essence, it means that the system is unpredictable – no one on any side, be it the side of law enforcement or the side of the rioters and terrorists, knows if the law will be enforced in any given circumstance. For example, in Northern Ireland there were well-documented 'no-go' areas for the British Army. Lord Widgery in his Report on Bloody Sunday commented on the existence of 'no-go' areas in the Bogside and Creggan areas in which the 'law was not effectively enforced'.[446] Later the Commission chaired by Lord Diplock in 1972 stated that, 'In Belfast and Londonderry the IRA terrorist groups operate from those areas which are Republican strongholds. For a long

[445] The terms operating in low profile or acting with restraint or showing political sensitivity are not defined but these terms suggest that when operating in this way the Army will not fully enforce the law.

[446] *Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to the loss of life in connection with the procession in Londonderry on that day* (HL 101, HC 220, 1972) para 10,11 and 12 (The Widgery Report).

time there were 'no-go' areas into which neither the police nor the army entered.'[447]

4.32 According to Evelegh these 'no-go' areas were negotiated by the General Officer Commanding Northern Ireland, Lieutenant–General Sir Harry Tuzo, and a self–appointed group of prominent citizens and 'must have been authorised at Cabinet level'. [448] Hamill also states that the Security Forces 'were specifically instructed not to enter the 'No-Go' areas because their presence might be seen as inflammatory'.[449]

4.33 Another example would be the parades and processions that were allowed to proceed as the British Army looked on, 'despite having been prohibited throughout Northern Ireland by law since 9 August 1971'.[450] Lord Widgery stated that the decision to allow a march had been taken by a 'higher authority' than the Chief Constable and General Ford.[451] The only conclusion to draw is that a decision was made at Cabinet level to direct the British Army and the RUC to do nothing as the law was being broken.

4.34 Another example would be the firing of Armalite rifles by members of the IRA at the very public funerals of deceased volunteers. Some of these examples of where the law was not enforced by the British Army were broadcast on television and watched by the British public night after night in their living rooms.

4.35 Evelegh states that the '14th August 1969 marked a key point in the collapse of the general framework of constitutional legality in Northern Ireland'.[452] In theory, the British Army should act on the initiative of the senior officer on the ground and be answerable for his actions in a civil court of law. In practice, the British Army in Northern Ireland did as it was directed by Westminster and that gap between theory and practice remains unaddressed.

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[447] *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, 1972) para 17 (The Diplock Report).
[448] Evelegh (n391) 17.
[449] Hamill (n417) 112.
[450] The Widgery Report (n446) para 10-12.
[451] ibid.
[452] Evelegh (n391) 23.

## The Constitutional Position of the British Army during the Falls Road Curfew

4.36 The Falls Road Curfew of 3 July 1970 highlights the constitutional issues outlined above. The Falls Road Curfew was an isolated incident in the sense that no other curfews were imposed during the Troubles in Northern Ireland. The fact that it was never repeated is evidence of the British government's determination to retain ultimate authority, but the issues raised by the imposition of the Falls Road Curfew are of a much wider significance in the conflict.

4.37 The Falls Road Curfew lasted 35 hours but it encapsulated the constitutional legal issues of the conflict. It highlighted the problematic question of who controlled the Army, not just in relation to the decision to deploy troops but also in relation to decisions regarding tactics employed once the troops had been deployed. It brought the gulf between the constitutional legal framework on the one hand and the administrative norms on the other, under the spotlight and challenged the assumption, based on those administrative norms, that the elected government would, at the very least, be informed of military tactics.[453]

## The Rising Levels of Violence in the Days Prior to the Curfew

4.38 The Falls Road Curfew is an example of the tactics used by the British Army. The Falls Road Curfew should be understood in the context of rising violence on the streets, with more violence anticipated as another marching season approached. The fact that 'between 30,000 - 40,000 people had left their homes because of intimidation and went to areas among their co-religionists'[454] is indicative of the turmoil that existed in the Province at the time. Over the weekend of the 27/28 June 1970 there were flashpoints on the Crumlin Road, Springfield Road in West Belfast and Ballymacarrett, in the east of the city. In all three areas, violent clashes between Roman Catholics and Protestants took place. Six people were killed and 113 people were wounded, 54 Protestants, four Roman Catholics, 52

[453] This gap between the constitutional framework and the assumptions about military control made in a Democratic States persists.
[454] Hamill (n417) 36.

soldiers and three members of the RUC.[455] In response to this escalating violence and the threat of worse to come, the government imposed ever more draconian measures.

4.39 In the week preceding the curfew the Joint Security Committee had noted increased levels of violence and had reviewed the options available, including the introduction of martial law.[456] Interestingly the idea of a curfew was raised at the meeting but considered impossible. The discussion focused on whether to 'impose a statutory curfew under Regulation 19 of the Special Powers Act[457] on the 28 June 1970, but concluded that a limited curfew was not a possibility under the emergency legislation as it stood'. [458] To combat the rising levels of violence the government had enacted the Criminal Justice (Temporary Provisions) (Northern Ireland) Act [459] on June 1 1970. [460] Simon Winchester, referring to the St. Matthews Church incident on the 27 June 1970 and the first shots fired by the Provisional IRA,[461] noted that 'The Bill was put before Parliament on Tuesday night, just two days after the violence of the weekend.'[462] Brice Dickson makes the same point stating that:

> There can be no denying, however, that sometimes, anti-terrorist legislation has been little more than a knee-jerk reaction to a particular event. The first Prevention of Terrorism Act was enacted in a 24-hour period within seven days of the Birmingham pub bombings in 1974.[463]

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[455] Geoffrey Warner, 'The Falls Road Curfew Revisited' (2006) 14(3) Irish Studies Review 325, 329.
[456] The National Archive (TNA): Public Records Office (PRO) DEFE 13/ 730 Conclusions of a meeting of the Joint Security Committee 28 June 1970 quoted in Colm Campbell, Ita Connolly, 'A Model for 'War against Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew' (2003) 30(3) Journal of Law and Society 341, 352.
[457] The Civil Authorities (Special Powers) Act (Northern Ireland) 1922.
[458] Colm Campbell, Ita Connolly, 'A Model for 'War against Terrorism'? Military Intervention in Northern Ireland and the 1970 Falls Curfew' (2003) 30(3) Journal of Law and Society 341, 352.
[459] Criminal Justice (Temporary Provisions) (Northern Ireland) Act 1970.
[460] Brice Dickson, 'Northern Ireland emergency legislation- the wrong medicine?' [1992] Public Law 592, 597.
[461] Simon Winchester, *In Holy Terror: Reporting the Ulster Troubles* (Faber and Faber Ltd 1974) 61.
[462] ibid 64.
[463] Dickson (n460) 597.

What is not known of course is whether Whitehall officials had been working on this piece of legislation for some time prior to placing it before Parliament in anticipation of a rise in violence in the conflict.

4.40 The Attorney-General of Northern Ireland, Mr. Basil Kelly, while introducing the legislation to the Stormont Parliament, admitted that it might lead to 'wrong convictions and harsh cases'.[464] The head of the RUC, Sir Arthur Young, described the legislation at the time as 'appalling'[465] and it is easy to understand why. The legislation provided for a minimum mandatory custodial sentence for anyone found guilty of 'riotous behaviour', 'disorderly behaviour' or 'behaviour likely to cause a breach of the peace'. The problem was that the legislation failed to distinguish between those doing battle with the Security Forces and those involved in 'ordinary' fighting that takes place in Northern Ireland just as it does everywhere else in the United Kingdom. Those individuals involved in public disorder would normally expect to be 'bound over' to keep the peace or be conditionally discharged or perhaps receive a small fine in a Magistrates' Court. However, under the new legislation those individuals accused of the same offences in Northern Ireland would be sent to prison.

4.41 The legislation placed the police in a difficult position when dealing with general public order incidents. The fact that the legislation was manifestly unjust would have tended to undermine the Stormont government's legitimacy. The introduction of such a piece of legislation suggests that the Stormont government was operating under increasing pressure. It was against this backdrop, amid rising fears and tension on all sides, that the Falls Road Curfew took place

## The Curfew

4.42 On the 3 July 1970 at 4p.m. the 1st Battalion Royal Scots Borderers sent a message to the 39th Infantry Brigade saying that they had received a tip-off from a housewife at 24 Balkan Street, in the Lower Falls Road area, that there weapons

[464] Winchester (n461) 64.
[465] ibid.

and explosives hidden in the house.[466] The 39th Infantry Brigade had responsibility for that area of Belfast and arrived at Balkan Street at 4.30p.m.[467] This tip-off confirmed 'information received the previous day, and backed up some long-term intelligence'.[468] The joint British Army/police unit arrived at the address and uncovered fifteen pistols, one rifle, a Schmeisser sub-machine gun and a quantity of explosives.[469] In terms of IRA weapons caches this was 'a small arsenal'[470] and so the whole incident ought to have been over quickly without any repercussions.

4.43 What happened next is unclear. One version of events is that the British Army/police unit cordoned off both ends of Balkan Street and a small crowd gathered behind the barriers and threw stones and bricks at the departing forces. The Security Forces responded with CS gas[471] and as things escalated a one-ton British Army Humber, referred to as a 'pig' by the locals, reversed into some railings crushing a man on the spikes in the process.[472] The British Army chronology of events is that as the British Army patrol left Balkan Street it met with 'heavy organised rioting'.[473] The British Army unit reported at 6.55p.m.that two grenades had been thrown.[474] The commander of the 39th Brigade, Brigadier Hudson, ordered that the area be secured to prevent movement in or out at 7.18p.m.[475] The first shots were fired at 8.10p.m. and the curfew was imposed at

[466] Hamill (n417) 36.
[467] The National Archive (TNA): Public Records Office (PRO) FCO 33/1077 HQ Northern Ireland Press Release 17 September 1970 quoted in Warner (n452) 325.
[468] Hamill (n417) 36.
[469] ibid.
[470] Winchester (n461) 68.
[471] Sean O' Fearghail, *Law (?) and Orders: The Belfast 'Curfew' of 3-5 July 1970* (Central Citizens Defence Committee 1970) 10.
[472] Winchester (n461) 69.
[473] Warner (n455) 326.
[474] ibid.
[475] ibid.

10p.m.[476] It was broadcast by loudspeaker from a low-flying helicopter.[477] The curfew affected 50 streets and 10,000 occupants.[478]

4.44 Campbell states that the decision to impose a curfew was probably taken by the Sir Ian Freeland (GOC NI). Campbell draws this conclusion from the Army's Situation Report for that day which states that at 10p.m. curfew orders were issued for the Falls Road area which he claims 'strongly suggests that the decision was not made by local troops and points towards the Director of Operations/GOC (NI)'.[479] Hamill claims that Sir Ian Freeland later admitted that he alone made the decision because getting permission for a curfew would have taken too long.[480] Hamill goes on to claim that the decision to impose the curfew was taken without any consultation with Stormont and further suggests that had Stormont been consulted then it was far from certain that ministers would have agreed to the curfew.[481]

4.45 On the first night of the curfew the Security Forces conducted widespread house-to-house searches during which the soldiers came under fire. During the 35 hours that the curfew was in place, the RUC and the British Army searched 3,000 homes.[482] The scale of the fighting is revealed by the following statistics. The curfew involved 3,000 British Army soldiers and they fired 1,452 rounds of ammunition, and used 218 CS gas grenades and 1,322 CS gas cartridges. The ammunition used has been broken down as follows - 17 rounds of .303 ammunition from rifles equipped with telescopes, 10 rounds of 9mm ammunition from the Sterling sub-machine gun, and 1427 rounds of 7.62mm ammunition from standard self-loading rifles (SLRs).[483]

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[476] The imposition of a curfew was denied in Parliament on the 6 July 1970 by Lord Balniel. See HC Deb 6 July 1970, vol 803, col 328-34. Mr. Michael Foot MP questioned this denial, stating that it was contradicted by most independent journalists working at the scene at the time. He made the point that a curfew existed whether formally imposed or not.
[477] ibid 326.
[478] Mr. Gerry Fitt MP gave these statistics in a Parliamentary debate 6 July 1970 HC Deb 6 July 1970, vol 803, col 328-34.
[479] Campbell, Connolly (n458) 353.
[480] Hamill (n417) 37.
[481] ibid.
[482] John Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press 1990) 66.
[483] Winchester (n461) 71.

4.46 Apart from a firefight, the curfew involved the following four elements. No one was allowed to enter or leave the curfew area. Those within the curfew area were ordered to stay inside. There were mass house-to-house searches and lastly, there were a large number of arrests. During the 35-hour long curfew, these restrictions were temporarily lifted to allow those affected by the curfew to move around within the curfew area to shop for food and on Sunday morning to allow attendance at church.

4.47 The curfew uncovered a total of 29 rifles and carbines, three submachine guns, eight shotguns, thirty-two revolvers, nineteen automatic pistols, 24,973 rounds of ball ammunition and 621 shotgun cartridges.[484] It has also been claimed that the British Army discovered 250lbs of explosives and 100 homemade bombs and eight two-way radio sets.[485] Hamill makes the point that the curfew was a success in military terms.[486] By that he means that the violence was suppressed and the British Army won the battle.

## The Results of the Curfew

4.48 The Falls Road Curfew resulted in four people dead, widely believed to be innocent,[487] (although this figure is disputed)[488] fifty-seven civilians wounded, eighteen soldiers wounded and 337 arrests.[489] It seems almost unbelievable that more civilians were not killed or hurt since the Yellow Card issued to every British soldier made it clear that no warning shots should be fired above the heads of the crowd and instead every shot was to be fired at a target.

[484] Warner (n455) 326. These figures are not consistently quoted and there is some disagreement about the numbers of guns of various types found in the house-to-house searches.
[485] Edward Burke, 'Counter-Insurgency against 'Kith and Kin'? The British Army in Northern Ireland1970-76' (2015) 43(3) The Journal of Imperial and Commonwealth History 658, 661.
[486] Hamill (n417) 39.
[487] Campbell, Connolly (n458) 343.
[488] Official casualty figures state six civilians killed quoted in Warner (n455) 326. According to Desmond Hamill the number of civilians killed was 5. See Hamill (n417) 37.
[489] Warner (n455) 326.

4.49 The content of the Yellow Card was not published at the time but has since become known. The instruction not to fire warning shots is problematic. Under Article 2 of the European Convention[490] members of the Security Forces are not allowed to kill except under strictly defined conditions when it is absolutely necessary.[491] If firing warning shots could defuse a situation then it is difficult to argue that firing directly at those involved could ever be absolutely necessary. The result, should someone die, would be that taking aim and firing would be murder, since there was an alternative course of action that had it been tried may have resolved the situation. The RUC Force Instructions on the other hand directed RUC members to fire warning shots. The Yellow Card instructions also seem at odds with the Army's stated policy of using minimum force.

4.50 What is also interesting is that Eric Morris, who was stationed, on and off, in Northern Ireland from 1969-1979 as a member of the Army teaching staff, revealed that one of the main fears among senior Army officers was that British soldiers would baulk at firing on British citizens and would instead fire over the heads of the crowd. That fear may have been well-founded if 1,452 rounds of ammunition were fired and only 4 people died and 57 civilians were wounded. Either that or the soldiers were very poor shots.

4.51 Commentators generally agree that the curfews significance was that it was very counter-productive. The Falls Road Curfew is cited, along with the policy of internment and Bloody Sunday, as one of the three things responsible, above all else, for reversing previously good relations between the British Army and the

[490] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 26 October 2017]

[491] Art. 2 European Convention on Human Rights provides as follows:
(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is necessary:
(a) in defence of any person from unlawful violence.
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Roman Catholic community.[492] However, although the later incidents contributed to worsening relations between the Roman Catholic minority and the Security Forces, many identify the Falls Road Curfew as the tipping point in the relations between members of the Roman Catholic community and the British Army.[493] Paddy Devlin claimed that the effect of the curfew was to turn the 'population from neutral or even sympathetic support for the military to outright hatred of everything related to the Security Forces'.[494] This view was mirrored in the Home Office's weekly summary of events in Northern Ireland published on 7 August 1970 in which it was noted that the Roman Catholic community of Northern Ireland, 'has lost much of its confidence in the Army to control the situation in an impartial way, and feelings against the Army are running high amongst Catholics in general'.[495] It has also been suggested that the curfew 'greatly increased the IRA's membership and further hampered the efforts of moderate Catholic and Protestant leaders alike to keep the peace'.[496] Others have described the curfew as a 'serious mistake and public relations disaster' [497] and it has been claimed that 'From almost every possible perspective the operation was an overwhelming disaster.' [498] A view endorsed by the British Army's report on 'Operation Banner'. [499] This 'backlash' [500] may also explain why there were no further curfews imposed during the Troubles.

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[492] Daniel C Williamson, 'Moderation under fire: The Arms Trial Crisis, The Lower Falls Road Curfew and Anglo-Irish Cooperation on Northern Ireland' (2010) 21 Irish Studies in International Affairs 197, 206; Christopher Tuck, 'Northern Ireland and the British Approach to Counter-Insurgency' (2007) 22(2) Defence and Security Analysis 165, 172.

[493] Christopher Tuck, 'Northern Ireland and the British Approach to Counter-insurgency' (2007) 22(2) Defence and Security Analysis 165, 172; Edward Burke, 'Counter-Insurgency against 'kith and kin'? The British Army in Northern Ireland, 1970-76' (2015) 43(4) The Journal of Imperial and Commonwealth History 658, 661.

[494] Paddy Devlin, *Straight Left: An Autobiography* (Blackstaff Press 1993) 134

[495] The National Archive (TNA): Public Records Office (PRO) CJ 4/269: HONIP, 7 August 1970 quoted in Warner (n455) 336.

[496] Kevin Boyle, Tom Hadden, Paddy Hillyard, *Law and State: The Case of Northern Ireland* (Martin Richardson and Co. 1975) 75-76.

[497] Williamson (n492) 206.

[498] Finn (n482) 69-70.

[499] Ministry of Defence, 'Operation Banner: An Analysis of Military Operations in Northern Ireland, Army Code 71842' [July 2006] 2-8.

[500] Ronald Francisco, 'The Dictator's Dilemma' in Christian Davenport, Hank Johnson and Carol Mueller (eds), *Repression and Mobilisation (Social Movements, Protest, and Contention)* (University of Minnesota Press 2005) 59 defines a backlash as a '… massive, rapid, and accelerating mobilisation in the wake of harsh repression'. The term 'harsh repression' would relate to measures that are legally ambiguous.

4.52 This analysis is however not universally accepted. Raymond Quinn for example suggests that the relationships between the Catholic community and the British Army remained good after the curfew although it was deteriorating. He suggests that it was only at the end of 1970 that the IRA began to discourage friendly relations between the Roman Catholic community and the British Army.[501] Simon Winchester echoes this understanding stating that:

> There were many months left in which Catholic people and soldiers would talk together and swap tea and gossip: but the curfew was the beginning of the end for the army, and before very long, any Catholic seen "fraternising" was in for a head shaving, a smashed kneecap, or a bullet in the brain.[502]

4.53 The Falls Road Curfew was also significant politically because 'it was one of the most clearly identifiable steps on the road that led, eventually and inexorably, to the downfall of the Stormont Government two years later'.[503]

## The Legality of the Curfew

4.54 The legality of the curfew was upheld by a resident magistrate who found those who refused to obey Army instructions to go indoors, guilty of the offence of disorderly behaviour or behaviour likely to occasion a breach of the peace under s9 (1) of the Criminal Justice (Miscellaneous Provisions) Act (N.I.) 1968. The reasoning behind the decision of the magistrate was that the soldiers were regarded as individual citizens acting to prevent violent crime and were taking all reasonable steps to prevent violence and suppress a riot. The imposition of a curfew was upheld on this basis by a Magistrate's ruling.[504]

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[501] Raymond Quinn, *A Rebel Voice: A History of Belfast Republicanism 1925-1972* (Belfast Cultural and Local History Group 1999) 171 quoted in Warner (n455) 336.
[502] Winchester (n461) 75.
[503] ibid 68.
[504] Gen. Freeland's Curfew Order Was Right, Rules City Magistrate' Belfast Telegraph, 8 September 1970 quoted in Campbell, Connolly (n458) 344.

4.55 The curfews legal significance was that it relied upon non-statutory powers that 'many had assumed were obsolete and ran directly counter to the […] democratic and constitutional norms of the twentieth century'.[505] Given there was no statutory basis for the curfew then the lawfulness of the curfew must have been based either on the common law or on prerogative powers and both of these possibilities present difficulties, including the fact that these powers have a 'democratic deficiency'. [506] That is, these powers allow the British Army to act without government authority or even government approval. They create a locus of power that exists outside of the elected government. So consequently, the government is responsible to Parliament for the British Army's actions but has no control over what the British Army does.

4.56 Theories about emergencies generally accept the need for a State to extend its powers in times of crises, but in a democratic State, even in times of emergency, there is little appetite for elevating the military to a position of power over the democratically elected government. For this reason, Colm Campbell makes the point that the curfew 'was the closest any part of the state came to a form of martial law since the Irish Troubles of the 1920s'.[507]

4.57 Aside from the democratic deficiency, the other issue is that because the law was out of step with established administrative practices, there was a lack of clarity as to the legal basis for action.[508] If the legal basis for the imposition of the Falls Road Curfew was the common law, then this presents two potential issues. Firstly, there is a potential problem relating to whether the time for which the curfew was imposed was reasonable and secondly there is a potential problem in relation to whether the area covered by the curfew was again reasonable in the circumstances. In other words, if the necessity for the curfew can be established, then there is no issue relating to the ordering of the curfew itself. If the situation justified these restrictions then the curfew would be lawful only for the time it took to clear the streets of the rioters and establish some level of order. Once the

[505] Campbell, Connolly (n458) 343.
[506] ibid 370.
[507] ibid 344.
[508] After 30 years of the Troubles these issues have not been resolved.

violence had been suppressed then the Stormont government could issue an Order under the Special Powers Act for the curfew to continue. [509] Mr. Gerry Fitt MP (soon to be leader of the Social Democratic and Labour Party) questioned the legality of the curfew in the House of Commons on the basis that once the violence was contained there was no necessity to maintain the curfew for a further 24 hours. The legality of the Falls Road Curfew was also raised in the meeting of the Joint Security Committee held on the 4 July 1970 and it was decided that legal advice should be sought.[510]

4.58 The alternative explanation is that the curfew was an exercise of prerogative power, but this explanation also runs into various problems. Firstly, as Campbell points out, it is not clear that historically such a prerogative power ever existed.[511] If it had existed then there is still a problem with this explanation. At the time of the Falls Road Curfew there was already a statutory power to impose a curfew under Special Powers Regulation 19. Campbell argues that this statutory power would operate 'to nullify any prerogative power that claimed to operate in the same sphere' [512] and he cites various cases that confirm this position. [513] The argument follows that since the curfew was not ordered under Special Powers Regulation 19 then no prerogative power could be relied upon as the legal basis of the curfew.

## The Legality of the House-to-House Searches during the Curfew

4.59 In the area where the curfew was imposed, house-to-house searches were conducted with little sensitivity. Simon Winchester claims that in some of the houses that were searched by the British Army there 'was very little furniture left

[509] HC Deb 06 July 1970, vol 803, col 330.
[510] The National Archive (TNA): Public Records Office (PRO) DEFE 13/370 Conclusions of a Meeting of the Joint Security Committee, 4 July 1970.
[511] Campbell, Connolly (n458) 370.
[512] ibid.
[513] *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 2 WLR 590; *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935 quoted in Campbell, Connolly (n458) 371.

standing, or indeed intact. Gas and water pipes had been torn out, holes smashed in walls with rifle butts, beds upturned and broken, floorboards torn up'.[514]

4.60 Campbell points out that some of these house-to-house searches must have been conducted using common law powers since no certificates of search were issued during the initial stages of the curfew.[515] The fact that certificates of search were issued after the initial searches had taken place, suggests that the legal basis of the house-to-house searches was understood at the time as being potentially contentious, and that the issuing of certificates in the later stages of the curfew was a damage limitation exercise.

4.61 The reason why the reliance on the common law as the legal basis for the house-to-house searches was contentious was that it brought into sharp relief that not only did the British Army have independent authority to deploy troops in order to contain civil disturbances, but that it also had the authority to determine what tactics to engage once the troops had been deployed.[516] And the decision to use a particular tactic had no built-in safety checks. In other words, there was no agreement in place ensuring that the government would be consulted on any action contemplated by the British Army post-deployment to the scene.

4.62 Perhaps inevitably, one of the consequences of the curfew was that the imposition of any future curfews would need prior Ministry of Defence (MOD) approval.[517] In other words, the government moved quickly to re-assert its authority. What is even more interesting is that imposition of the Falls Road Curfew was never challenged in a superior court of law nor did it prompt a public enquiry[518] nor was its legality challenged by any other European State.

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[514] Winchester (n461) 73.
[515] Campbell, Connolly (n458) 355.
[516] Evelegh (n391) 28.
[517] The National Archive (TNA): Public Records Office (PRO) DEFE 25/273 MOD Signal Message Form from MOD (Army) to NORIRELAND 15 July 1970.
[518] The National Archive (TNA): Public Records Office (PRO) CAB 128/47 Cabinet conclusions 29 June 1970 show the curfew was not even important enough to be included on the agenda for the British Government Cabinet meeting held on the 29 July 1970 let alone prompt a Public Enquiry.

4.63 The conflict in Northern Ireland can be understood to have various battlegrounds. One of those battlegrounds is legitimacy and an important aspect of the battle for legitimacy is legality. So, when the State operates within the rule of law, it makes it more difficult for its enemies to undermine its legitimacy. So, the assumption is that the State will want to maintain the rule of law or the perception of it, in order to distinguish its own actions from the unlawful violence of the terrorists. On the other hand, if the State operates unlawfully it will provide powerful evidence of illegitimacy that can be used to attack the State in the courts. In this sense, the law itself is a dimension of the conflict, providing a platform on which the two sides can continue hostilities. Operating unlawfully will play into the hands of the terrorists because 'The principle goal of an insurgency is not to defeat the armed forces, but to subvert or destroy the government's legitimacy, its ability and moral right to govern.'[519]

4.64 The ambiguity of the legal basis of the Falls Road Curfew and then the continued ambiguity of the tactics deployed throughout the curfew, doesn't sit easily with the phenomenon of 'legal black holes'.[520] That is the idea that violent conflicts create lacunae where law doesn't reach. Instead, the ambiguity fits better with the metaphor of 'disguised legal black holes' sometimes referred to as 'legal grey holes' in which 'violent conflict is characterised by legal ambiguity, and a lack of accountability and indeterminacy as to whether the States action is lawful'.[521]

4.65 Given the curfew's ambiguous status it is not immediately obvious why the curfew did not generate any legal challenges. But the fact is that it did not, and that failure is significant because it raises questions about the effective functioning of the law in Northern Ireland at the time. If the law didn't operate as it was supposed to and ensure that people were held to account, then it may provide some small insight into why in the second half of the twentieth century, in a Western democracy, people resorted to such violence. The flip side of the coin is that, if obstacles existed that made bringing cases before the courts more

[519] Courtney Prisk, 'The Umbrella of Legitimacy' in Max Manwaring (ed), *Uncomfortable Wars: Toward a New Paradigm of Low Intensity Conflict* (Westview Press 1991) 69.
[520] For a fuller discussion of these terms see chapter two para 3.33.
[521] For a fuller discussion of these terms see chapter two para 3.33.

difficult, then this might have resulted in Ministers and officials or both exploiting that situation and deliberately failing to seek clarification on the lawfulness or otherwise of measures that were being taken. In other words, government officials and Ministers could deliberately avoid seeking legal advice on certain policies because they feared those policies were unlawful or worse still, they had been told informally by government lawyers that those policies were unlawful.

4.66 There is an example of this happening. There is clear evidence that officials in Whitehall were keen to keep the legal status of using CS gas, 2-chlorobenzalmalononitrile, as a crowd-control agent as indeterminate.[522] This is just one small example but it at least provides evidence that Ministers and officials were not above exploiting legal uncertainties.

4.67 Writing in 1971 David Carlton and Nicholas Sims[523] drew attention to the British government announcement on 2 February 1970, more than a year earlier, that the British government regarded the use of CS gas, and other such gases, in a war, as being outside the scope of the Geneva Protocol's ban on chemical and biological warfare of 1925. Carlton and Sims focused on the announcement made by the Labour Secretary of State for Foreign and Commonwealth Affairs, Mr. Michael Stewart, in response to a Parliamentary question by Mr. Alexander Lyon, Labour MP for York. In a statement to Parliament Mr. Michael Stewart stated:

> I should like to take this opportunity to explain the Government's view on the scope of the 1925 Geneva Protocol, as regards the use of tear gases in war. In 1930, the Under Secretary of State for Foreign Affairs, Mr. Dalton, in reply to a Parliamentary question on the scope of the Protocol said: "smoke screens are not considered as poisonous and do not therefore, come, within the terms of the Geneva Gas Protocol. Tear gases and shells producing poisonous fumes are,

[522] The National Archive (TNA): Public Records Office (PRO) DEFE 24/622 CS gas DS/13/3/1 dated 14 December 1971 in a letter from Thomas Brimelow (FCO) to P. D. Nairne (MoD). (Letter from Brimelow to Nairne)
[523] David Carlton, Nicholas Sims, 'The CS Gas Controversy: Great Britain and the Geneva Protocol of 1925' (1971) 13(10) Survival Global Politics and Strategy 333.

however, prohibited under the Protocol".[524] This is still the Governments position.[525]

4.68 Michael Stewart went on to explain that:

> Modern technology has developed CS smoke which unlike the tear gases available in 1930, is considered not to be significantly harmful to man in other than wholly exceptional circumstances; and we regard CS and other such gases accordingly to be outside the scope of the Geneva Protocols. CS is in fact less toxic than the screening smokes which the 1930 statement specifically excluded.[526]

4.69 The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, prohibited the use in warfare of 'asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices'.[527] The problem was that 'tear gas came to occupy an ambiguous position within the terms of the Protocol'.[528] The term tear gas became widely used to describe a range of agents that temporarily incapacitated those it was used on by affecting their eyes and the mucus membrane in the nose, throat and lungs, rather than just one specific agent.

4.70 The British had developed CS gas in 1928 but it was not until 1956 that it was developed into a riot-control agent. The British shared the agent with the Americans and by 1971 American forces were using 10 million kilograms a year in Vietnam.[529] American use of CS gas made the situation more sensitive that it would otherwise have been. The CS gas in use in 1960s and 1970s was

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[524] HC Official Report 18 February 1930, vol 235, cols 1169-70 quoted in Carlton, Sims (n523) 333.
[525] HC Deb 2 February 1970, vol 795, cols 17-18 W quoted in Carlton, Sims (n523) 333.
[526] ibid.
[527] United Nations, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, available at: http://www.refworld.org/docid/4a54bc07d.html [accessed 26 October 2017 (UN 1925 Protocol on Poisonous Gases)
[528] Alex Spelling, '"Driven to Tears": Britain, CS Tear Gas, and the Geneva Protocol, 1969-1975' (2016) 27(4) Diplomacy and Statecraft 701, 703
[529] ibid 705.

substantially less poisonous than the earlier gases available in 1930 when Mr. Dalton had told Parliament that tear gases were prohibited under the Geneva Protocol.

4.71 The position behind the scenes was that there was 'intense inter-departmental debate'.[530] One of the MOD's concerns was that the legality or otherwise of CS gas would affect British Army tactics in Northern Ireland where the British Army regularly used CS gas to disperse rioters and prevent an escalation of violence between the Protestant and Roman Catholic communities.[531] The MOD wanted to continue using the CS gas, arguing that CS gas could be of value in conflict situations where minimum force was the priority. These situations included conflicts where the 'enemy' was indistinguishable for the general population.

4.72 The Geneva Protocol governs armed conflicts and since the British position regarding Northern Ireland was that the violence did not amount to an armed conflict, the violence in Northern Ireland ought not to have been factored into any decision regarding CS gas and the Geneva Protocol. Except that approving CS gas for crowd control in the United Kingdom while at the same time making it clear that CS gas was too toxic for use in an international armed conflict could prove embarrassing for the British government. Spelling quotes the MOD as stating that the British public 'will fail to be impressed by a logic that permits the use of CS gas on British citizens but condemns its use on…Soviet infantry'[532] and could very quickly lead to demands for CS to be banned for domestic use. Another concern raised by MOD officials was that if it was decided that the use of CS gas fell inside the protocol then this risked jeopardising the 'Special Relationship' with the USA as it might be interpreted as a criticism of American forces in Vietnam who were using CS gas on a large scale.[533] The position taken by the MOD was that CS gas in its less toxic form was outside the Protocol. The Foreign and Commonwealth Office's (FCO) concern was that publicly announcing that

[530] ibid 701.
[531] ibid 711.
[532] ibid.
[533] Letter from Brimelow to Nairne (n522).

CS gas fell outside the Protocol would undermine the United Kingdom's position at the UN during the coming negotiations on chemical weapons.

4.73 The MOD and the FCO made preliminary approaches to the Law Officers who gave informal indications that their Opinion was likely to be that CS gas did come within the scope of the Geneva Protocol. Both departments then agreed that a formal Opinion should not be sought. [534] The logic is convoluted and difficult to follow but the point is that officials from the MOD and the FCO agreed not to seek formal legal advice on whether CS gas fell within the scope of the Geneva Convention [535] because they had already been told informally that it did but wanted to continue to use it. By 1972 the legal advice from the Solicitor-General and the Attorney General indicated that 'there was very little doubt…CS gas was covered…' by the Protocol.[536]

4.74 This example is an indication that Whitehall was prepared to exploit legal ambiguities when the opportunity presented itself. It is just one small example but it sheds some light on official thinking and attitudes towards international law, and by implication law generally.

4.75 Having examined the constitutional position of the British Army operating in Northern Ireland and looked at how in practice the British government managed to retain control over the British Army despite the constitution, the next chapter will examine the extent to which the ordinary criminal law was able to hold to account individual soldiers accused of using unjustifiable force.

[534] Letter from Brimelow to Nairne (n522).
[535] UN 1925 Protocol on Poisonous Gases (n527)
[536] The National Archive (TNA): Public Records Office (PRO) FCO 66/305 Letter from Mr. Steel (FCO) to Mr. D.L. Benest 19 March 1972.

## Chapter 4: The Use of Force by British Soldiers and the Operation of the Ordinary Criminal Law during The Troubles

5.1 Soldiers operating overtly and covertly in Northern Ireland were governed by the ordinary criminal law in relation to the use of force.[537] Emergency legislation co-existed with the ordinary criminal law but was surprisingly silent on the use of lethal force by the Security Forces against suspected terrorists. This arrangement was very different to previous campaigns conducted by the British Army outside the United Kingdom, for example, in Aden, Borneo, Kenya, Malaya, where due to the declared Emergency, civil courts had no jurisdiction over the military.

5.2 This chapter will concentrate on the use of ordinary law during the Troubles and the process by which individual soldiers were investigated, charged and prosecuted for using unjustifiable force. It will begin to look at how the system operated in terms of the three functions of law in relation to soldiers on the ground as opposed to officers formulating tactics and policy.

5.3 Legal provisions can be understood, in an ideal world, as performing three basic functions. [538] Those functions are, firstly control, secondly guidance and thirdly the provision of a transparent process of investigation, prosecution and sentencing for those who break the law. This chapter will attempt to assess the extent to which the legislation governing the British soldiers operating in Northern Ireland performed those basic functions. In other words, in relation to the control function, did the law impact on decisions made by members of the Security Forces and if so to what extent. In relation to guidance, did the law set out clearly when and what actions were legitimate. So was the law accessible and easily understood by members of the Security Forces. In relation to the third function of law, that is the provision of transparent processes in the justice system, the question is, did the law provide those working within the justice system, both

[537] The ordinary criminal law was amended in various significant ways and as a consequence was arguably not so ordinary. See chapter two for a more detailed discussion. The amendments included relaxed evidentiary rules, an undermining of the right to silence, no presumption of innocence in relation to certain crimes, police testimony became sufficient to find membership of proscribed organisations, and the suspension of a right to trial by jury.

[538] Sean Doran, 'The use of force by the security forces in Northern Ireland: a legal perspective' (1987) 7 Legal Studies 291

investigating and prosecuting, with a clearly understood process? Did it provide those in the court system a clear framework by which actions can be assessed and appropriate sentences handed down?

5.4 These three functions are discrete but to some extent interdependent. For example, the effectiveness of the law in controlling the actions of the Security Forces will be to some degree reliant on both the chances of a guilty verdict once charged with an offence, and then of course the likely sentence that would be imposed. Therefore, if the chance of a guilty verdict is slim and the sentence, even if convicted, is light, then it seems reasonable to assume that the control function of law will be weakened. Similarly, the effectiveness of the law in providing guidance and setting limits to legitimate action, will be to some degree dependent on the level of awareness of what the law is and when it applies.

5.5 In order to assess the legal constraints imposed on the Security Forces[539] by operating within the ordinary criminal law, it might be useful to look at the impact of the law on the soldiers patrolling the streets. There is a perception among commentators that in relation to legal constraints there is a distinction between soldiers in uniform and those soldiers that operated undercover. [540] The belief seems to be that soldiers involved in covert operations were more difficult to control and more likely to disregard the law. This seems to be a view held both inside and outside the military. Hughes states that, 'regular military officers can also be suspicious of plain-clothes 'cowboys', regarding them as an undisciplined liability'.[541] Evelegh states in relation to military plain-clothes operations, 'there were doubts about their control'.[542] Mark Urban quotes SAS soldiers summing up their attitude to lethal force as ''big boys' games, 'big boys' rules' and using this

[539] The Security Forces were made up of the British Army including the Ulster Defence Regiment, and the Royal Ulster Constabulary. However, the primary focus in this chapter is the military.
[540] Mark Urban, *Big Boy's Rules: The SAS and the Secret Struggle against the IRA* (Faber and Faber 1992) 73.
[541] Geraint Hughes, 'The use of undercover military units in counter-terrorist operations: A historical analysis with reference to contemporary anti-terrorism' (2010) 21(4) Small Wars and Insurgencies 561, 571.
[542] Robin Evelegh, *Peace Keeping in a Democratic Society: The Lessons from Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978) 30.

as a 'justification for killing people'. [543] However, the focus here is soldiers in uniform carrying out routine tasks like patrolling the streets, conducting house-to-house searches and manning checkpoints.[544]

5.6 The only real way to assess the effectiveness of the law in relation to the three functions of law as outlined above is to ask those involved for their opinions. That is ask soldiers who served in Northern Ireland the extent of the impact that the law had on them, and to structure the questions in terms of the three functions of law outlined. Short of doing this however some analysis is still possible.

5.7 In order to assess the extent to which the law constrained the actions of the soldiers patrolling the streets, it would be useful to look specifically at whether the investigation process was independent and transparent and try to gauge the impact, if any, of the erosion of powers of the coroner. This will involve looking at whether the decision to prosecute was politically manipulated, and whether the formulation of the legislation itself worked against securing prosecutions against members of the Security Forces who used lethal force in contested circumstances. Before looking at these aspects of the legal framework under which the Security Forces operated, it is perhaps worth looking at the available statistics that relate to the use of lethal force and the use of less than lethal force by members of the Security Forces [545] in relation to prosecutions and convictions.

## The Statistics

5.8 'A substantial proportion of the deaths due to 'terrorism' in Northern Ireland have been the result of Army or police shootings.' [546] Figures quoted by Greer and others indicate that 'a total of 2,304 people were killed up to 1983 and 264 (or 11.5%) were of this kind'. [547] Many of these have taken place in disputed

[543] Urban (n540) 73.
[544] Covert operations are dealt with in chapter five.
[545] The statistics do not always separate out the figures for the Army and the RUC.
[546] Steven Greer, Tom Hadden, Martin O'Hagan, 'Civil Liberties in Northern Ireland: From Special Powers to Supergrasses' *Fortnight* 214 (Belfast, 18 February 1985) 5 <www.jstor.org/stable/i25547694> accessed 24 December 2017.
[547] ibid.

circumstances but yet only a handful of these soldiers and policemen had been prosecuted by 1985. Giving evidence to the Defence Select Committee on the 7 March 2017 Professor Kieran McEvoy stated that of the total number of deaths directly attributable to the Security Forces, 63% of the victims were undisputedly unarmed and only 12% of victims were confirmed to have been in possession of a weapon.[548] Despite these statistics relating to killings Huw Bennett claims that 'fewer that ten per cent of killings and assaults committed by soldiers were prosecuted'.[549]

5.9 'Relatives for Justice' dispute the figure of 11.5% claiming it is a clear under-estimate of the real figure and as such is just a 'propaganda myth'.[550] 'Relatives for Justice' claim that the figure of 11.5% is based only on Army and police shootings and fails to factor in deaths caused as a direct consequence of State collusion. If statistics relating to collusion are included in the figures then 'Relatives for Justice' claim that the more accurate figure would be 33% of all killings and assaults were perpetrated by the State.[551]

## Fatal Shootings by the RUC

5.10 The Police Service of Northern Ireland (PSNI) Statistics Branch recorded the number of security related deaths. [552] Records began in July 1969 and between

[548] Professor Kieran McEvoy, Evidence to the Defence Select Committee of the UK Parliament, 7 March 2017 citing research by Professor Fionnuala Ni Aolain <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/investigations-into-fatalities-in-northern-ireland-involving-british-military-personnel/written/48436.html> accessed 17 June 2017.

[549] Huw Bennett, 'Smoke Without Fire? Allegations Against the British Army in Northern Ireland, 1972-5' (2013) 24(2) Twentieth Century History 275, 303.

[550] Committee on the Administration of Justice 'The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: a narrative of official limitations on post-Agreement investigative mechanisms' Committee on the Administration of Justice [CAJ 2015] 4. <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15131009/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf> accessed on 17 March 2017. (CAJ The Apparatus of Impunity)

[551] ibid 4.

[552] The definition of a security related death is 'a death which is considered at the time of the incident to be directly attributed to terrorism, where the cause has a direct and proximate link to subversive/sectarian strife or where the death is attributable to security force activity.' This definition was provided in the response to FOI Request F-2016-00321 from the Police Service of Northern Ireland.

that date and December 1998 'there were 47 security related deaths in which the attribution was recorded as RUC or RUC reserve where the officer was on-duty'.[553] Attribution is as perceived by the Police based on information available at the time of the incident.[554] Of these 47 deaths, the Discipline Branch of the Police Service of Northern Ireland have 'confirmed that there is no record of any officer being convicted of murder or manslaughter while acting in the line of duty between 1970 and 1998'.[555]

## Fatal Shootings by the British Army

5.11 The number of fatal shootings by British soldiers during the Troubles is 293.[556] 'The Historical Enquiries Team (HET) was set up in 2005 as a specialist police unit in order to re-examine 3,268 deaths that were categorised as conflict-related deaths that occurred between the year 1968 and 1998 that did not involve the police as perpetrator.' [557] Part of the HET's brief was to investigate the 154 killings involving the soldiers of the British Army between 1970 and 1973.[558] Many of those killed were not members of any paramilitary organisation and therefore these fatal shootings claimed the lives of innocent people. For example, Urban points out that 'The IRA 'Roll of Honour' for fallen volunteers shows that during 1979 to 1980, only one IRA member was killed by the entire Army in Northern Ireland.'[559] However, the number of fatal shootings by soldiers for that period was nine.[560]

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[553] Response to FOI Request F-2016-00321 from the Police Service of Northern Ireland.
[554] ibid.
[555] ibid. There are no figures available for 1968 and 1969. The investigation of historic killings involving the police is currently the responsibility of the Ombudsman.
[556] The total number of deaths by British soldiers is 297 between 1969 and 2001 but four of these are not shootings -two were stabbings and two were killed by Army vehicles. These figures are from The Sutton Index of Deaths. Malcolm Sutton, *Bear in Mind these Dead… An Index of Deaths from the Conflict 1969-1993* (Beyond the Pale 1994) reproduced in CAIN at <http://cain.ulst.ac.uk/sutton/chron/index.html> accessed on 17 March 2017.
[557] Patricia Lundy, Bill Rolston, 'Redress for Past Harms? Official apologies in Northern Ireland' (2016) 20(1) The International Journal of Human Rights 104, 110.
[558] ibid.
[559] Urban (n540) 81.
[560] Malcolm Sutton, *Bear in Mind these Dead… An Index of Deaths from the Conflict in Ireland 1969-1993* (Beyond the Pale 1994) reproduced in CAIN at <http://cain.ulst.ac.uk/sutton/chron/index.html> accessed on 17 March 2017.

## Conviction Rates for Members of the RUC and the British Army

5.12 It seems to be generally accepted that the conviction rates in relation to contentious fatal shootings and other less serious crimes alleged to have been committed by British soldiers and the RUC were very low. Bennett states that, 'under 100 soldiers were convicted of offences against civilians between 1972 and 1975'.[561] Professor Anthony Jennings has worked out that between 1969 and 1985 members of the Security Forces in Northern Ireland killed 270 people.[562] Of those killed 155 were deemed to be unaffiliated with any paramilitary groups, the Security Forces or prison personnel.[563] In relation to those killings, twenty-one members of the Security Forces were prosecuted and two were convicted.[564] Of the two soldiers that were convicted during this period, one was convicted of manslaughter and given a suspended sentence and the other was convicted of murder and served two years and three months.[565] Jennings was quoting statistics for successful prosecutions prior to 1988. However, the figures are now available for the entire conflict.

5.13 In relation to fatal shootings, the British Army's official report of its operations in Northern Ireland (known as Operation Banner) cites that there were only four convictions in the whole of the conflict, (one of those was subsequently overturned on retrial).[566]

5.14 Referring to the figures relating to 1969-1988 Jennings claimed that that the figures were evidence that to a large degree the Security Forces have been

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[561] Bennett (n549) 279.
[562] Anthony Jennings, 'Shoot to Kill: The Final Courts of Justice' in A Jennings (ed), *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (Pluto 1988) 104.
[563] ibid.
[564] Carol Daugherty Rasnic, *Northern Ireland: Can Sean and John Live in Peace? An American Legal Perspective* (Brandy Lane Publishers Inc. 2003) 23
[565] Raymond Murray, *State Violence: Northern Ireland 1969-1997* (Mercier Press 1998) <www.cain.ulst.ac.uk/issues/violence/murray.htm> accessed 17 July 2017
[566] Committee on the Administration of Justice Submission from the Committee on the Administration of Justice (CAJ) [2017] to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report on the UK under the International Covenant on Civil and Political Rights (ICCPR) 5 <https://www.caj.org.uk/2017/06/30/s465-united-nations-human-rights-committee-response-concluding-observations-7th-periodic-report-uk-international-covenant-civil-political-rights-iccpr/> accessed 17 July 2017. In the case of *R v Clegg*, the conviction was overturned on retrial.

'granted by the courts the unilateral authority to determine whether those suspected of unlawful paramilitary activity are guilty or not'.[567] His comments, are arguably, equally relevant to the figures relating to the entire conflict.

5.15 Four soldiers were convicted of unlawful killing during the entire conflict. In the 17 years between 1969 and 1991 two soldiers were convicted of unlawful killing in Northern Ireland and in less than four years, between 1991 and 1995, a further two soldiers were convicted. This led Julian Barnes, MP for Canterbury, to speculate that the increase in the number of convictions could be just serendipity, or it could be due to a sudden breakdown in discipline across four British Army regiments or it might be due to a hardening of attitudes within the criminal justice system towards British Army soldiers serving in Northern Ireland.[568] What he seems to be implying is that at the beginning of the conflict, when the violence was much more unpredictable and the British State was in 'shock' and trying to come to terms with the conflict, the entire criminal justice system worked to protect State actors from being convicted of any offences. However, as the conflict dragged on and the violence became more predictable, the criminal justice system was less sympathetic towards the British soldiers. A hardening of attitudes by the justice system towards the State and its agents would not be surprising in these circumstances. However, the fact that there are so few cases makes drawing conclusions difficult.

5.16 As well as shootings by the military there were other less serious allegations of crimes committed by soldiers while they were dealing with civilians. These include assaults and offences when undertaking house-to-house searches. In terms of assaults, there was a stream of complaints relating to ill-treatment of detainees. Between August 1971 and June 1972 3,276 prisoners were processed at police holding centres.[569] Between April 1971 and June 1972 1,105 complaints alleging ill-treatment or assault by the RUC had been received by the investigations

[567] Jennings (n562) 104.
[568] Julian Barnes MP House of Commons 1 February 1995 <https://www.hansard.millbanksystems.com/commons/1995/feb/01/northern.ireland-rules-of-engagement> accessed 17 July 2017.
[569] Council of Europe, *Yearbook of the European Convention on Human Rights 1976* (Martinus Nijhoff, The Hague 1977) 906.

department set up under the Police Act (NI) 1970 to investigate complaints against officers.[570] The results of these complaints were that 23 police officers were charged and 6 were convicted. The sentences ranged from a fine to a conditional discharge.[571]

5.17 In relation to allegations of offences committed during house-to-house searches these included 'the destruction of homes, and sacred objects, and acts of abuse and intimidation'.[572] The number of house-to-house searches undertaken was very large. The official figures are as follows: 1971: 17,262, 1972: 36,617, 1973: 74,556, 1974: 71,914, 1975: 30,094, 1976: 34,939, 1977: 20,724, 1978: 15,462, 1979: 6,280.[573] Paddy Hillyard estimated that one in four Roman Catholic men between the ages of 16 and 44 had been arrested at least once between 1972 and 1977.[574] On average every Catholic household in Northern Ireland had been searched twice, but since some homes were not under suspicion then other houses would have been searched 'perhaps as many as ten times'.[575]

5.18 Various reasons for conducting house-to-house searches in mainly Republican areas have been put forward. These reasons include building up files on the occupants of all the houses. Another reason for conducting house-to-house searches was to do 'head checks' and search for weapons and explosives.[576] Interestingly, the use of the Northern Ireland (Emergency Powers) Act 1973 s13 as the basis of authority to conduct house-to-house searches remains a contested issue. Boyle and others state that 'it has always been doubtful whether the Army's powers to search houses for explosives or firearms (s15) [of the 1978 Act][577] can

[570] ibid.
[571] ibid.
[572] William Beattie Smith, *The British State and Northern Ireland Crisis 1969-1973: From Violence to Power Sharing* (United States Institute for Peace 2011) 151.
[573] Kevin Boyle, Tom Hadden and Paddy Hillyard 'Emergency Powers Ten Years On' *Fortnight* 174 (Belfast, January 1980) 4, 6 <www.jstor.org/stable/i25546753> accessed 24 December 2017.
[574] Paddy Hillyard, 'Political and Social Dimensions of Emergency Law in Northern Ireland' in Anthony Jennings (ed), Justice Under Fire (Pluto 1988) 197.
[575] ibid.
[576] Evelegh (n542) 29.
[577] Northern Ireland (Emergency Powers) Act 1978 replaced the Northern Ireland (Emergency Powers) Act 1973 and s15 of the 1978 Act only very slightly expanded s13 of the 1973 Act. In other words, it is essentially the same section.

properly be used on a house-to–house basis'.[578] In addition, Mr. Justice McGonical in *Regina v Riley and Rimmer* on 21 January 1975 questioned whether the legislation gave authority to the military to conduct 'head checking'.[579]

5.19 The small number of soldiers being prosecuted for murder and other serious crimes may, at least in part, be also explained by the attitude of the Director of Public Prosecutions (DPP). In 1972, the DPP announced that it was his general intention to refuse to prosecute members of the Security Forces who killed or wounded civilians while on duty.[580] Huw Bennett suggests that this attitude may have stemmed from the fact that the 'DPP and his senior personnel had all served in the army themselves and wanted to help the army in its task of beating the IRA'.[581] Nevertheless, some soldiers were prosecuted but those facing criminal proceedings were rarely convicted. Robin Evelegh states that many 'soldiers are charged, although few are convicted with civil offences[582] ranging from murder to minor assault'.[583] After interviewing many officers, Mark Urban commented that 'Officers know it is highly unlikely that the juryless courts in Northern Ireland will convict a soldier for murder, since they are bound to make allowances for the person who has killed in the line of duty'.[584] Bennett makes the same point stating that 'soldiers knew their chances of getting away with it were reasonably good'.[585]

5.20 This attitude suggests a lack of respect for the law and the entire justice system. Mark Urban made the point that 'Many officers are cynical about the legal process, often as a result of seeing men and women whom they believe to be guilty of terrorist crimes walk free or receive light sentences.'[586] In 1972 at a

[578] Boyle, Hadden, Hillyard (n570) 4, 5.
[579] *Regina v Riley and Rimmer* [1975] Belfast City Commission quoted in Robin Evelegh, *Peace Keeping in a Democratic Society: The Lessons from Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978).
[580] Huw Bennett, 'Detention and Interrogation in Northern Ireland, 1969-75' in Sibylle Scheipers (ed), *Prisoners in War* (Oxford University Press 2010) 198
[581] Bennett (n549) 303.
[582] Evelegh distinguishes civil offences dealt with in the civil courts from offences dealt with under military law.
[583] Evelegh (n542) 85.
[584] Urban (n540) 73.
[585] Bennett (n549) 290.
[586] Urban (n540) 74.

meeting with Michael Havers, the then Solicitor–General, forty officers from the 3rd Royal Green Jackets went further and complained that some IRA members were not even prosecuted for political reasons.[587] The views of individual soldiers towards the law and the extent to which they felt constrained by the law requires further research. However, the slim evidence available tends to suggest that the law was less than fully effective in relation to the level of control the law exerted on individual soldiers.

5.21 The belief held by soldiers that their chances of 'getting away with it' were good is backed up by statistics. Although the figures are fragmented, they still throw some light on the extent to which the Security Forces were held to account. For example, during the period between March 1972 and September 1974, there were 502 criminal investigations involving the British Army and the RUC.[588] Only fifty-six of those investigations, a shade over 10%, led to prosecutions and of those prosecutions there were seventeen convictions most of which were for minor offences.[589] However, according to Huw Bennett once convicted the soldiers could expect to receive similar sentences as civilians convicted of like offences in the rest of Britain.[590] In other words, an equivalent to the 'mere-gook' rule, which is said to have operated during the Vietnam War to devalue the lives and property of the Vietnamese people by providing them with less than full legal protection, was never in operation in Northern Ireland. The 'mere-gook' rule was never a policy endorsed by any American administration but was simply used to hint that no American would ever be punished for killing any Vietnamese.

5.22 However, Bennett then appears to contradict himself by stating that 'soldiers who were unfortunate enough to be caught abusing civilians, and they were few, suffered light punishments'.[591] During the Troubles only four members of the

[587] See Rosie Cowan, 'Cosy conspiracy between the cardinal and the cabinet minister that let an IRA priest go free' *The Guardian* (London: 21 December 2002) at <https://www.theguardian.com/uk/2002/dec/21/northernireland.northernireland> accessed 12 October 2017.
[588] ibid 288.
[589] Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press Ltd 2000) 96.
[590] Bennett (n549) 289.
[591] ibid 303.

Security Forces were convicted of murder while on duty.[592] Following government intervention all three served less than four years of a life sentence before being released under an Executive Order and resuming a career in the Army.[593] The forth man was acquitted in a retrial. Perhaps the point that Bennett was making was that although the figures tend to suggest that even if the sentence was unremarkable, the length of time actually served was relatively short. However, there are no statistics available in relation to lesser offences in terms of sentences received. Consequently, the question of whether or not the soldiers received comparable sentences to other United Kingdom citizens has not been fully resolved and requires further investigation.

5.23 The low conviction rates in these cases may also have been down to the reluctance of the Roman Catholic communities to contact the RUC. The British government directed complaints to be made directly to the RUC, but the RUC were distrusted among the Roman Catholic community. At the same time, Huw Bennett concludes that there is some evidence that senior officers may have been reluctant to investigate or punish men under their command for transgressions of both the British Army standard operating procedures and or the law.[594] Edward Burke also makes similar claims, namely that some British Army officers turned a blind eye to reprisal tactics undertaken by the men under their command.[595] Burke goes on to suggest that this may have been because the entire Roman Catholic community had come to be viewed as 'complicit in the deaths of British soldiers'.[596] In other words, as the number British soldiers killed in the Troubles mounted, some British soldiers came to define the word 'guilt' so widely that it included members of the general Roman Catholic community.[597] If this was the case then such attitudes may have allowed the presumption of innocence to be

[592] Mark McGovern, 'Ignatieff, Ireland and the Lesser Evil' in (eds), Bob Brecher, Mark Devenney, Aaron White, *Discourses and Practices in Terrorism: Interrogating Terrorism* (Routledge 2010) 145.
[593] CAJ The Apparatus of Impunity (n550) 4.
[594] Bennett (n549) 303.
[595] Edward Burke, 'Counter-Insurgency against 'Kith and Kin'? The British Army in Northern Ireland, 1970-76' (2015) 43(4) The Journal of Imperial and Commonwealth History 658, 669.
[596] ibid 672.
[597] ibid 659.

swept away and allowed a punitive approach or what would be classed as essentially reprisal tactics to be tolerated at senior levels.

5.24 Bennett states that 'by March 1972, the Army largely believed that the Catholics in the Province were troublemakers'.[598] Burke interviewed British Army officers who seem to confirm that the Army did on occasions take a punitive approach in certain areas. Major Martin Smith of 2nd Battalion, Grenadier Guards admitted that he did systematically 'tear up' houses that had been used by the IRA as sniper positions. By 'tear up' he meant that 'walls were knocked in, floor boards were removed and the garden dug up using Royal Engineer mechanical diggers'.[599] Another officer from the 2nd Battalion, Scotts Guards admitted that he had allowed his men to take punitive action against the population of the Brandywell. He recounted that his men had written offensive slogans on pieces of corrugated iron and then tied them to their patrol vehicles to 'piss-off' the locals. [600] An alternative explanation for the damage done is that officers were unable to control their own men. Of course, the extent of the damage caused and the level of intimidation felt, remains unknown.

5.25 Despite these admissions, on the face of it, the statistics would suggest that, by and large, the British Army did operate within the law. After all, as of July 1972 there were over 22,000 soldiers deployed in Northern Ireland and there were less than 100 convictions by 1975. However, in addition to the reasons mentioned above there might be another reason why these statistics may not reveal the whole truth.

5.26 If a member of the Security Forces opened fire and was accused of doing so unjustifiably, then he was charged and prosecuted under the ordinary criminal law. The reason for this is that the soldier is also a citizen and as such is subject to civil law as well as military law. It follows that an action that constitutes an offence, if committed by a civilian, will also be an offence if committed by a

[598] Bennett (n549) 279.
[599] Burke (n595) 665.
[600] ibid 670.

soldier. The soldier can therefore be tried and punished for such an offence in a civil court.[601]

5.27 During the Troubles the ordinary criminal law governing the use of force was contained in s3 of the Criminal Law (Northern Ireland) Act 1967.[602] This piece of legislation set out the limits to permissible force.[603] Using ordinary law to govern a situation that is far from ordinary is problematic because the legislation draws no distinction between members of the public, members of the Security Forces or a suspected terrorist using force. Kader Asmel claims that:

> The attempt to apply the same principles of criminal liability to ordinary members of the public and the Security Forces is defeated when the latter are equipped with deadly weapons and placed in circumstances where they may be under a duty to use them.[604]

This argument becomes all the more powerful if it is accepted that the Yellow Card provided little guidance to soldiers making the decision whether or not to open fire.[605] In addition to the Criminal Law Act (Northern Ireland) 1967, the common law also allows for the use of force in the defence of oneself and to act in the defence of others, so long as the degree of force used is reasonable in the circumstances.[606]

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[601] Military courts are not allowed to try the most serious offences – treason, murder, manslaughter, treason-felony, or rape, if the offences can with reasonable convenience be tried by a civil court unless the offence is committed by a soldier 'on active service'. The use of an unjustifiable use of force may also result in action for damages against the Ministry of Defence for the alleged tort.
[602] Criminal Law (Northern Ireland) Act 1967.
[603] Criminal Law Act (Northern Ireland) 1967 s3(1) states: 'A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.' Criminal Law Act (Northern Ireland) 1967 s3(2) states that subsection (1) shall replace the rules of the common law as to the matters dealt with by that subsection.
[604] Kader Asmal, *Shoot to Kill? International Lawyers' Inquiry into Lethal Use of Firearms by the Security Forces in Northern Ireland* (The Mercier Press Ltd 1985) para 134.
[605] See chapter 4 para 5.41-5.49 for a more detailed discussion of the Yellow Card.
[606] 'Private' defence is defence of oneself and others, whereas 'public' defence is the prevention of a crime or the effecting of a lawful arrest under s3 of the Criminal Law Act (NI) 1967.

5.28 The interrelationship between s3 of the 1967 Act and the common law defence of self–defence and the defence of others remains contentious among academics[607] but the courts have settled on preserving the common law defences as separate and discrete from s3.[608] In addition, the courts have held that both s3 and the common law defences are open to the Security Forces when lethal force has been applied. In other words, the courts have accepted that the Security Forces when applying lethal force could be defending themselves or others, rather than acting in the prevention of crime.[609]

5.29 In the case of *R v Robinson*, a specifically trained police unit was sent to apprehend a known terrorist believed to have arrived in Northern Ireland to kill members of the Security Forces. It was believed that he would be travelling in a car with one other person who was also thought to be a dangerous terrorist. Both occupants of the car were ordered to stop as the car was being reversed. The police officer saw the occupants in the car move in such a way as to make him think that the passenger had a gun and was about to open fire on him. The police officer shot at the car and then the passenger door opened and he fired again. The police officer was charged with murder. The court held that if the defendant honestly believed that his life was in danger then he was entitled to rely on self-defence as a defence and be acquitted.

5.30 This decision is problematic because self-defence is essentially a civilian concept that assumes both a reluctance to initiate aggression and a mental state of defence against a threat. It is difficult to judge a soldier in a 'war' situation fighting and attacking an enemy by the standards used to judge an ordinary citizen who has been attacked. Both the common law and s3 are formulated around the concept of 'reasonableness' and explaining the phrase 'reasonable in the circumstances' has been the focus of most of the debate since s3 and the common law provide no

[607] It has been suggested s3 removed the common law defences. See John Smith, Brian Hogan, *Criminal Law* (Butterworths 1983) 505. It has also been suggested that even if the common law defence remains then it should not be open to members of the Security Forces in the application of lethal force. The argument goes that the police officer and the soldier use lethal force to prevent crime and so the only proper provision to be used is s3. See John Stannard, 'Lethal Force in Self-Defence' (1980) 31(2) Northern Ireland Legal Quarterly 173, 176.
[608] Doran (n538) 293.
[609] *R v Robinson* [1984] 4 NIJB quoted in Doran (n538) 293

guidance as to what the limits of permissible force are.[610] Academics have tended to address the issue of what is reasonable force by asking two questions. First 'was the force necessary (or reasonably believed to be)'[611] and secondly was the force used 'proportionate to the evil to be avoided?'[612] In other words, the concept of reasonableness contains two distinct elements, necessity and justification. Both have to be met before any of the defences can be raised successfully.

5.31 The questions of necessity and justification can be formulated as follows. The question of necessity involves asking whether the defendant could have achieved his objective[613] in another way without using the degree of force actually used. The question of justification is more complicated and requires a balancing act. On the one hand, there is an assumption that the threat posed by the victim could not have been eliminated using a lesser force, and on the other hand there is the question of whether the level of force is proportionate to the identified threat. There is an additional element to the law established in *Beckford*, and that is the defendant should be judged on the facts as he genuinely believed them to be.[614] This is referred to as the rule in *Beckford* and it establishes that the defendant's use of force must be judged on the basis of the facts as he honestly believed them to be, and not on the basis of whether force was objectively necessary. In other words, if a soldier genuinely believes a set of facts, which if they were true would justify the level of force used, then his honestly held belief removes any intent to act unlawfully and this in turn means that he is entitled to be acquitted.

5.32 What this means is that if the defendant is mistaken as to the facts he can rely on his mistake. If, on the other hand, the defendant has full knowledge of the facts but genuinely mistakes the level of force permitted by law to deal with the

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[610] The Home Office, *The Criminal Law Revision Committee Seventh Report, Felonies and Misdemeanors* (Cmnd 2659, 1965) para 23 proposed that a judge might assist a jury as to the meaning of reasonable force by drawing their attention to:

- the nature and degree of force used
- the seriousness of the evil to be prevented
- and the possibility of preventing it by other means

However, this was not included in the legislation and so cannot help with any interpretation.

[611] Doran (n538) 294.

[612] ibid.

[613] This could be a private defence, that is the prevention of a crime or affecting an arrest.

[614] *Beckford v Queen, The* [1987] 3 ALL ER 425. [*Beckford*]

perceived threat, then the defendant will not be able to rely on his mistake and will therefore have no defence to murder.

5.33 The principle in *Beckford*, on the face of it, gives members of the Security Forces operating in Northern Ireland near 'carte blanche'. However, there are a number of limitations on its scope. First, the principle in *Beckford* applies exclusively to criminal law. So, a member of the Security Forces who uses lethal force in a situation he honestly believes justifies its use, will not be subject to any criminal sanction. However, even if acquitted following a trial in the Crown Court, the rule in *Beckford* does not prevent him being liable in tort. Second, the principle in *Beckford* only leads to an acquittal for the defendant if the defendant believed the facts justified the level of force used. In other words, the principle in *Beckford* will not provide a defence to murder for a defendant who uses force in a situation where even the facts the defendant believed existed would not justify the level of force used. Thirdly, commentators have suggested that the rule in *Beckford* will not apply where the defendant's mistake in relation to the facts is grossly negligent or reckless.[615]

5.34 The courts have provided some guidance as to the meaning of the term reasonable force, but arguably not enough for the average soldier on foot-patrol or manning a checkpoint. The decision in *Attorney General of Northern Ireland's Reference* (No.1 of 1975) provides an explanation of the meaning of reasonable force.[616]

5.35 The 1975 case involved a soldier who shot dead Patrick McElhorne, an unarmed man with no paramilitary connections, when he tried to run away. The defendant, Sergeant MacNaughton, said that he had shot Patrick McElhorne in the belief that he was a member of the Provisional IRA and that he might reveal his position to another member of his organisation. The House of Lords said that the soldier had been right to open fire if he thought the person was a terrorist evading arrest and might subsequently reveal the positions of soldiers lying in ambush putting their

[615] John Stannard, 'Excessive Defence in Northern Ireland' (1993) 43 Northern Ireland Legal Quarterly 147, 157.
[616] *Attorney General of Northern Ireland's Reference* (No. 1 of 1975) [1976] 2 ALL ER 937.

lives in danger.[617] The soldier was acquitted in what has been described as 'possibly the most baneful of all the domestic decisions relating to the conflict'.[618]

5.36 Nevertheless the Attorney General sought further guidance from the Northern Ireland Court of Appeal on the right of members of the Security Forces to open fire, by making reference to s48A of the Criminal Appeal (Northern Ireland) Act 1968.[619] The Attorney General wanted guidance on whether or not a soldier commits a crime if he opens fire and kills someone, honestly and reasonably believing that the victim is a member of a proscribed organisation, and if it is a crime, is it murder or manslaughter? The House of Lords said the question was not appropriate for an Attorney General's Reference because the issue was hypothetical. Nevertheless, Lord Diplock concluded that in order to decide whether reasonable force had been used or not then the jury would have to ask themselves:

> Are we satisfied that no reasonable man:
>
> a) with knowledge of such facts as were known to the accused or reasonably[620] believed by him to exist;
> b) in the circumstances and time available to him for reflection;
> c) could be of the opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape, justified exposing the suspect to the risk of harm that might result from the kind of force the accused contemplated using?[621]

5.37 In other words, the answer to the question of whether reasonable force had been used in the circumstances, is a matter of fact for the jury to decide.[622] So in every

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[617] *Attorney General of Northern Ireland's Reference* [1977] AC 105,138F.
[618] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010) 251.
[619] Criminal Appeal (Northern Ireland) Act 1968 s48A. The question asked was as follows: 'Whether a crime is committed when a member of the security forces shoots to kill or seriously wound a person believed to be a member of a proscribed organisation in the course of his attempted escape.'
[620] This was prior to *Beckford* (n614*)* and the need for the belief to be honestly held.
[621] *Attorney General of Northern Ireland's Reference* [1976] NI 169, 207. [*Attorney General of Northern Ireland's Reference Case*]
[622] Or Diplock Judge.

case the focus is to judge, after the fact, whether the defendant used reasonable force in the circumstances and if he did then to acquit him.

5.38 The most obvious criticism of the ordinary criminal law is that it is too vague and gives insufficient clear guidance to the Security Forces as to when they may open fire. An ordinary soldier or policeman on the ground would need more detailed guidance when asking himself the question; in what circumstances can I open fire? In fact, in terms of providing guidance on future conduct it has been described as 'totally useless'.[623] The message provided by the House of Lords in the *Attorney General of Northern Ireland's Reference case*[624] seems to be that soldiers can open fire in any situation where they can subsequently convince the court that their actions were reasonable. In other words, the House of Lords refused 'to set any standard whatever as to when lethal force may be justified'.[625]

5.39 Guidance is required in various situations. The first is what level of harm must the victim threaten before lethal force can be used against him. So, for example, does the threat need to involve a risk to life or could it be a risk to property? The second is does the threat posed by the victim need to be an imminent threat? Interestingly Lord Diplock considered whether or not the threat needed to be imminent and concluded that:

> The defendant was entitled to take into account not only the short-term threat but (…) the killing or wounding of members of the patrol by terrorist in ambush, and the effect of this success by members of the Provisional IRA in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland entailed.[626]

5.40 If this were taken to its logical conclusion it would provide a large amount of protection for those who shot terrorists on sight from facing criminal

[623] Stannard (n615) 160.
[624] *Attorney General of Northern Ireland's Reference* Case (n620)
[625] Stannard (n615) 159.
[626] *Attorney General of Northern Ireland's Reference* (No.1 of 1975) [1976] 2 ALL ER 937, 947. [*Attorney General of Northern Ireland's Reference Case* ALL ER]

prosecutions. A third situation where further guidance is required is in relation to the probability of the perceived threat. Does the threat need to be a near certainty before lethal force can be used or is it good enough that the threat perceived is probable or even just likely?

5.41 Not surprisingly s3 of the Criminal Law Act (Northern Ireland) 1967 was judged to be too vague to provide effective guidance to members of the Security Forces on the use of force. The British Army therefore issued the Yellow Card [627] to all soldiers deployed in Northern Ireland. The Yellow Card was supposed to provide more detailed guidance and was issued for soldier's protection. The Yellow Card was a set of standing instructions issued to and carried by each soldier in Northern Ireland to give him guidance on when he could open fire.

5.42 The Yellow Card gave instructions to soldiers 'operating collectively', a term not defined, not to open fire without an order from the Commander on the spot. The Yellow Card also gave instructions to soldiers 'acting individually', again a term not defined, that they are generally required to give warning before opening fire and are subject to other general rules which provide *inter alia:*

> Never use more force than the <u>minimum</u> necessary to enable you to carry out your duties.
>
> Always first try to handle the situation by other means than opening fire. If you have to fire:
> *(a)* Fire only aimed shots.
> *(b)* Do not fire more rounds than are absolutely necessary to achieve your aim.

5.43 In addition, the Yellow Card also contemplated a situation in which it is not practicable to give a warning. It provided:

> You may fire without warning:

[627] Ministry of Defence, Instructions by the Director of Operations for Opening Fire in Northern Ireland Army Code No 70771 (London: HMSO 1980). Formally called the Instructions by the Director of Operations for Opening Fire in Northern Ireland. It was known as the Yellow Card because of the colour of the paper it was printed on.

> Either when hostile firing is taking place in your area, and a warning is impracticable, or when any delay could lead to death or serious injury to people whom it is your duty to protect or to yourself; and then only:
> *(a)* against a person using a firearm against members of the security forces or people whom it is your duty to protect; or
> *(b)* against a person carrying a firearm if you have reason to think he is about to use it for offensive purposes.

5.44 Lord Lowry, C.J. commented on the status of the Yellow Card in *R v MacNaughton*[628] and noted that the overriding duty of a soldier is to obey the civil rather the military law and he commented that:

> There was, of course, at the same time in existence what is called the yellow card; something the contents of which, it seems are largely dictated by policy and are intended to lay down guidelines for the security forces but which do not define the legal rights and obligations of members of the forces under statute or common law.[629]

5.45 Desmond Hamill has suggested that the idea behind issuing the Yellow Card 'was to draw the top line of what [a soldier] could do well below the top line of what the law said he could do'.[630] However, it is unfortunate that the Yellow Card was not much clearer than the law. Evelegh describes it as a 'complex document that required amendment from time to time and at one time contained 23 fairly elaborate paragraphs'. [631] Hamill describes it as a 'cumbersome set of instructions'.[632] The Widgery Report tends to confirm this analysis stating 'that it would be optimistic to suppose that every soldier could be trained to understand them in detail and apply them rigidly'.[633]

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[628] *R v MacNaughton* [1976] N.I. 203.
[629] ibid 206.
[630] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 49.
[631] Evelegh (n542)163.
[632] Hamill (n630) 50.
[633] *Report of the Tribunal Appointed to Inquire in the Events on Sunday, 30 January 1972, which led to the loss of life in Connection with the Procession in Londonderry on that day* (HL 101, HC 220, 1972) para 91. (The Widgery Report)

5.46 The instructions detailed on the Yellow Card, according to the Widgery Report, 'leave certain questions unanswered and, perhaps, unanswerable'.[634] The Report identified various ways in which the Yellow Card instructions were vague. Firstly, the report stated that:

> The Yellow Card instructions failed to make it clear that if a soldier opens fire defensively and restricts fire to that which is necessary whether that means the soldier should fire until the attacker desists and withdraws or whether the soldier should treat the attacker as an enemy in battle and continue to fire until he surrenders or he is killed.[635]

5.47 Secondly, the Report pointed out that the Yellow Card instructions are vague in relation to when opening fire is to be withheld on account of risk to others in the vicinity who are not themselves carrying or using firearms. The Report gives the example of a soldier facing a crowd of youths throwing stones where only one in the crowd is identified as holding a nail bomb. 'Is the soldier facing the crowd to hold his fire because of risk to those who are only throwing stones?'[636]

5.48 Thirdly, the Report stated that the Yellow Card instructions 'are vague in situations where soldiers are facing hostile fire and unsure whether a firearm is being used'.[637] How sure does a soldier need to be before he opens fire? 'Faced with such a situation does the soldier wait or does he give himself the benefit of the doubt and fire?'[638]

5.49 Like the British Army, the RUC also operated under the normal law and under Force Instructions. The Force Instructions given to members of the RUC were the equivalent of the Yellow Card given to British Army soldiers. The Force Instructions were not made public during the Troubles but they have now been

[634] ibid.
[635] ibid.
[636] ibid.
[637] ibid.
[638] ibid.

made available.[639] The Force Instructions are very similar to the Yellow Card and have the same legal status. They can be understood as written orders or a policy document. The Force Instructions normally require a warning to be given before shots are fired just like the Yellow Card. The Force Instructions also deal with situations where a warning is not possible.

5.50 The Force Instructions[640] include the following sections:

Section 2
The application of the law by the Courts

1. The question whether the amount of force used to effect an arrest or prevent the commission of a crime is reasonable in the circumstances is a question of fact not of law. The test to be applied is whether the conduct fell short of the standard to be expected of the reasonable man having regard to all the circumstances of the case.
2. The use of force by an officer is subject to ALL of the following conditions:
a) it is necessary, i.e. the objective cannot be achieved in any other way; and
b) the amount of force used will be reasonable in the circumstances;
c) only the minimum amount of force necessary to achieve the objective will be used; and
d) the amount of force used will be in proportion to the seriousness of the case.
3. As a guide, it is only in exceptional circumstances that the use of a firearm against a person will meet all four conditions set out at 2 (2).
4. Warning before firing.
4(1) In general a warning must be given before firing and should be as loud as possible.
5. You may fire without warning.
5(1) When hostile firing is taking place in your area, and a warning is impracticable:

[639] FOI Request Reference F-2016-00347. Force Instructions reprinted in 1988 Section 34 entitled Firearms and Explosives.
[640] ibid.

a) against a person using a firearm in circumstances which endanger life; or

b) against a person carrying what you can positively identify as a firearm if he is clearly about to use it in circumstances which will endanger life or cause serious injury; or

c) at a vehicle if the occupants open fire or throw a bomb at you or those whom it is your duty to protect, or are clearly about to do so; or

d) where a warning would increase the risk of death or serious injury to you or any other person; or

e) you or some other person has already come under armed attack; and there is no other way to protect yourself or others from the danger of being killed or seriously injured.

5.51 One difference between the Yellow Card and the Force Instructions is that the Force Instructions allow the RUC to fire warning shots in situations where a verbal warning would not be heard. The Parker Report commented on the fact that soldiers were not allowed to fire warning shots stating that 'the justification put forward for this somewhat surprising provision is that hooligans would rapidly note and take advantage of the regular firing of shots meant to pass harmlessly by; the carrying of firearms would cease to deter'.[641] The RUC clearly did not find this argument persuasive. Presumably all the criticisms made in the Widgery Report of the Yellow Card are equally applicable to the Force Instructions. They failed to provide an answer to the question, 'When can I open fire?'

5.52 Another difference between the Force Instructions and the Yellow Card is that the Force Instructions identify when firearms are not to be used.

Section 6 Firearms not to be used.

6(1) Firearms will not be used against:

[641] *Report of the committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism* (Cmd 4901, 1972) London: HMSO para 93. (The Parker Report)

a) any person or vehicle if all the conditions for the use of such extreme force are not met; or

b) any person who is merely suspected of a crime; or

c) a vehicle merely because it has failed to stop for a signal at a road check.

5.53 If the legislation on the use of force necessitated the creation of the Yellow Card and Force Instructions then clearly the law was failing in its function to provide guidance. In addition to being too vague, another criticism levelled at the ordinary criminal law is that it failed to deal adequately with situations where members of the Security Forces used excessive force.[642] The suggestion is that the legislation itself was weighted against getting a conviction in circumstances where lethal force was used but where a lesser degree of force was the appropriate response. This is because the ordinary criminal law allowed for only two possible verdicts. If a soldier honestly believed that lethal force was necessary then he should be judged on the facts as he believed them to be and he must be acquitted whether or not his belief was reasonable.[643] If he is not believed, then he must be convicted of murder. The reasonableness of the defendant's belief is relevant to the question whether the defendant held that belief at all. Since the more unreasonable the facts believed by the defendant are, the more likely it is that the defendant will not be believed.

5.54 The problem is that there is no lesser crime for which he can be convicted and this was confirmed in the case of *Beckford*.[644] So in the situation where a member of the Security Forces overreacts and uses lethal force unjustifiably he must either be convicted of murder and be given a mandatory sentence of life imprisonment or acquitted and allowed to go free.[645] The problem is that the court may find a life sentence too harsh in the circumstances and freedom too lenient.

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[642] Sean Doran, 'The Doctrine of Excessive Force' (1985) 36 Northern Ireland Legal Quarterly 314.
[643] *R v Williams (Gladstone)* [1987] 3 All ER 411.
[644] *Beckford* (n614).
[645] *R v McInnes (Walter)* [1971] 3 All ER 295.

5.55 In order to avoid this situation, certain common law jurisdictions [646] have developed the doctrine of excessive defence. The doctrine of excessive defence states that if a soldier has used excessive force and killed his victim in circumstances where some force would have been justified, but not lethal force, then the member of the Security Forces should be convicted of manslaughter and not murder. However, 'excessive defence clearly forms no part of the law in Northern Ireland'.[647]

5.56 In a situation where a soldier is accused of murder it is almost inevitable that a court is going to give the benefit of any doubt to a soldier doing what is undeniably a very tough job involving great personal risk. It is also the case that judges at the time came almost entirely from the Protestant community. In 1976 Protestants held 68 of the 74 senior court appointments[648] and were consequently likely to be naturally sympathetic towards members of the Security Forces who they viewed as fighting terrorism.[649] Huw Bennett states that 'those cases that did make it to the court were treated sympathetically'. [650] Lord Guthrie summed up the position more recently saying, 'Frightened, tired young men in dangerous situations don't always react as wisely as someone sitting in an armchair in London thinks they should. But provided they acted in good faith. We should do all we can to back them up.'[651]

5.57 It is therefore possible to argue that the legislation itself worked against successful prosecutions by not allowing a verdict of something less than murder but more than a complete acquittal. In doing so the legislation made the chance of a soldier being convicted of murder much less likely. This in turn may have undermined the effectiveness of the law in controlling decisions made by soldiers.

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[646] India, Canada, Australia and Ireland.
[647] Stannard (n615) 150.
[648] Laura Donahue, 'Terrorism and Trial by Jury, the Vices and Virtues of British and American Criminal Law' (2007) 59 Stanford Law Review 1321, 1338.
[649] This is not to say that the judges were biased and acted on the basis of those biases but rather they had in-built sympathy towards the Security Forces.
[650] Bennett (n549) 288.
[651] Thomas Harding, Toby Helm, Joshua Rozenberg, 'Blair and Goldsmith accused over court martial of Col. Mendonca' *The Daily Telegraph* (London, 21 July 2006). <www.telegraph.co.uk/news/uknews/1503000/Blair--and-Goldsmith-accused-over-court-martial-of-col-Mendonca.html> accessed 12 February 2017.

## The Investigation Process

5.58 In relation to the third function of law, that is the provision of transparent processes in the justice system, the first question is, did the law provide those working within the justice system, both investigating and prosecuting, with a clearly understood process? The second question is, did it provide those in the court system a clear framework by which actions can be assessed and appropriate sentences handed down?

5.59 The outcome of a trial is dependent on a string of separate decisions not just the final verdict by the Diplock Judge or a jury. It is dependent on the collection of evidence, the selection of charges, through to the plea-bargaining process in which the defendant may offer to plead guilty to some charges in return for a withdrawal of others or an indication of likely sentence. It may be that the procedures used to investigate deaths involving the British Army in Northern Ireland may also go some way to explain the low conviction rates in relation to the use of lethal force by soldiers.

5.60 It is claimed that 'the initial police investigation of killings was often inadequate'.[652] This is partly due to the sheer numbers of killings that the RUC were dealing with but more importantly it may be, at least in part, due to the informal arrangement that existed between 1970 and 1973 between the British Army and the police. These informal arrangements, referred to sometimes as the 'Tea and Sandwiches Inquiries' [653] involved splitting responsibility for any investigation into the use of lethal force by soldiers between the British Army and the Police. The British Army, specifically the Special Investigations Branch of the Royal Military Police,[654] was given responsibility for interviewing the soldiers while the police retained responsibility for interviewing the civilian witnesses and conducting all other aspects of the investigation. In other words, the Chief Constable delegated the responsibility for interviewing the principle suspects to the Royal Military Police and by doing so removed an opportunity for

[652] Lundy, Rolston (n557) 110.
[653] Owen Bowcott, 'Saville inquiry: over 150 killings by soldiers during the Troubles in Northern Ireland never fully investigated' *The Guardian* (London, 20 June 2010)
[654] Sometimes referred to by the acronym SIB.

independent scrutiny. The 154 investigations involving the Royal Military Police resulted in no convictions. [655] But perhaps more disturbing is the fact that 'in at least two cases soldiers gave false statements to the police, including an instance when soldiers bent the facts to fit the Yellow Card rules - on the advice of SIB police interviewers'.[656]

5.61 This informal arrangement presents various issues.[657] In 2003 these arrangements were judicially reviewed and in the High Court of Justice in Northern Ireland, Queens Bench Division, Sir Brian Kerr decided that the death of Mrs. Kathleen Thompson had not be effectively investigated and found it questionable as to whether a Chief Constable could delegate responsibility for part of the investigation in this way.[658]

5.62 Some light was shed on the arrangement in the Bloody Sunday Inquiry.[659] In the Bloody Sunday Inquiry soldiers giving evidence were referred to by a code to ensure their anonymity. The former member of the Royal Military Police referred to as INQ 3 stated that soldiers were not interviewed under caution and were treated as eye–witnesses rather that suspects. He went on to say that 'it was not a very formal procedure; we usually discussed the incident over sandwiches and tea'.[660]

5.63 If this informal arrangement weighted the investigation in favour of an acquittal, then the extent that it did so is clearly problematic. However, there is an alternative interpretation of the process. Evelegh states that under s28 (1) of the

[655] Lundy, Rolston (n557) 120.
[656] The National Archive (TNA): Public Record Office (PRO), DEFE 70/13 Lm from R. C. Kent DUS (Army), to Adjutant-General, 13 June 1972 quoted in Bennett (n551) 287.
[657] In terms of human rights law this arrangement presents problems and fails to satisfy the requirements of Article 2 for a compliant investigation namely effectiveness, independence, promptness and public accountability. See *McKerr v United Kingdom* (2002) 34 EHRR 553 paras 108-15.
[658] Lundy, Rolston (n557) 110.
[659] *The Report of the Bloody Sunday Inquiry* (HC 30, 2010-11, 2010). (The Saville Report)
[660] Pat Finucane Centre, 'Getting away with murder – from the Bogside to Basra' 30 April 2004 <http://www.patfinucanecentre.org/european-convention-human-rights/getting-away-murder-bogside-basra> accessed 17 March 2017.

Northern Ireland (Emergency Provisions) Act 1973[661] all members of the military police were also constables under the command of the RUC.[662] Members of the Royal Military Police, who undertook investigations into incidents involving lethal force, did so in their role as constables and took their orders from members of the RUC who were in charge of the investigation.[663] Soldiers being investigated for using lethal force were immediately ordered to give statements to the Special Investigation Branch of the Military Police in their role as constables.[664] These statements formed part of the evidence chain and were handed over to the RUC who in turn handed them over to the DPP. The statements could then be used in a court of law. Only when a soldier became a suspect, was he cautioned[665] but by that time it was too late. The soldier had been denied his right to silence and denied any legal advice, two of his basic legal rights.[666] This would suggest the process is weighted in favour of a conviction. However, the fact remains that conviction rates in relation to the use of lethal force were very low.

## The Prosecution Process

5.64 Once the police had concluded their investigation then they made recommendations as to the actual charges laid and then handed the file over to the DPP to determine if charges were to be brought and if so which ones.[667] The decision to charge and what to charge was very much dependent on what evidence had been presented in the file. The DPP could ask for further evidence to be collected but routinely the decision was made based on the evidence contained in

[661] s28(1) states that 'in this Act except so far as the context otherwise requires 'constable' includes any member of the Royal Navy, Military or Air Force Police'.
[662] Evelegh (n542) 87.
[663] ibid.
[664] Refusal to make a statement could result in a court martial and carried a maximum penalty of 10 years' imprisonment.
[665] The contention here is that when lethal force was used the whole patrol involved in the incident were questioned and only once the initial accounts had been taken was a suspect identified and at that point cautioned.
[666] However, this policy changed after October 1973 because of its inherent unfairness.
[667] Prior to 1972 and the creation of the office of the DPP in Northern Ireland all decisions on charges were taken by the RUC.

the file as the DPP received it.[668] In some cases, 'those cases of 'extreme difficulty' where the public interest was involved, the DPP could refer to the Attorney General'.[669]

5.65 So, the process looks quite straightforward on the face of it. The joint military-police investigation handed the evidence they had collected over to an independent DPP for a charging decision and in difficult cases the DPP invited guidance from the Attorney General. However, Huw Bennett claims that the system was not as transparent as it might first appear. Firstly, the Attorney General intervened in June 1972 at the request of the DPP because the DPP believed that the police were not sending him all the files relating to offences committed by the Security Forces.[670] Secondly, a belief in the independence of the DPP is perhaps misplaced since in June 1972 the DPP announced a general intention to refuse charges against members of the Security Forces who injure or kill civilians when on duty.[671] The independence of the Attorney General has also been called into question. Recounting his conversation with the Attorney General in a letter to General Sir Cecil Blacker in January 1974, General Frank King said that the DPP and the Attorney General had been Army officers themselves and knew first-hand the difficulties and dangers faced by soldiers and as a consequence were 'by no means unsympathetic or lacking understanding in their approach to soldier prosecutions in Northern Ireland'.[672]

5.66 In addition, the letter from General Frank King to General Sir Cecil Blacker throws some light on the involvement of senior officers in the decision to prosecute. In the letter, General Frank King recounted a conversation he had had with the Attorney General in 1974. In the conversation, the Attorney General had told General King that in fact 'directions not to prosecute had been given in more

[668] Kevin Boyle, Tom Haddon, Paddy Hillyard, 'Diplock Courts the Facts' *Fortnight* 95 (Belfast, 13 December 1974) 7, 8.
[669] Bennett (n549) 286.
[670] The National Archive (TNA): Public Records Office (PRO), DEFE 24/727 LM from R. C. Kent to Military Assistant to the Chief of the General Staff (hereafter MA/CGSJ), 27 June 1972 quoted in Bennett (n549) 287.
[671] Bennett (n549) 288.
[672] The National Archive (TNA); WO 296/75: Letter from Lt-General Frank King to General Sir Cecil Blacker, 17 January 1974 quoted in Bennett (n549) 299.

than a few cases where the evidence, to say the least, had been borderline'.[673] This looks like a clear admission that the Attorney General was prepared to 'bend' the law.

5.67 There is also some evidence that the senior British Army officers attempted to interfere with the legal process by 'leaning' on the DPP and the Attorney General in order to prevent prosecutions.[674] For example, General Frank King (GOC) is known to have raised his concerns over using the ordinary law to prosecute soldiers with the Conservative Attorney General Sir Peter Rawlinson in 1974.[675] He claimed that his men might become disinclined to act aggressively for fear of facing prosecution and imprisonment. The Attorney General tried to reassure General King that he reviewed all these cases personally and that less than 10% of them proceeded to trial. In his conversation with the Attorney General, General King also raised concerns in two individual cases attempting to dissuade the Attorney General from prosecuting in both cases. In the case of Sergeant Crossland the Attorney General agreed to discontinue proceedings but refused to bow to pressure in the other case relating to Private Ross. The reasoning in the case of Sergeant Crossland seems to be that Sergeant Crossland was accused of assaulting a civilian and although he ought to have been brought before a civil court, he had in fact been dealt with under military law. The fact that he had been dealt with under military law precluded a civil prosecution. It is hardly surprising that it is claimed 'that at times during the conflict immunity was afforded to soldiers … who would otherwise have faced prosecution'.[676]

5.68 At a later meeting the DPP, the Attorney General and the Director of Army Legal Services agreed to put in place a series of other measures giving the Army an opportunity to influence any decisions made in relation to soldiers facing possible prosecutions. These measures included providing background reports to the DPP, allowing a three-way consultation between the Army Legal Services, the DPP and Attorney General, and giving the GOC NI a right to make representations to the

[673] ibid.
[674] Bennett (n549) 303.
[675] Hamill (n630) 166.
[676] CAJ The Apparatus of Impunity (n550) 4.

Attorney General when the British Army believed a prosecution was not in the public interest. In addition, the DPP could ask the Attorney General to obtain further information from the British Army to help in making a decision as to whether a prosecution was in the public interest.[677]

5.69 Despite these not insignificant concessions, General King still believed that military jurisdiction was the real solution. [678] How these measures worked in practice requires further research. How often did the pressure brought by the Army using these measures succeed in stopping a prosecution? Were these arrangements ever formalised in a policy document outlining guidelines for their use? At the very least, it seems clear that soldiers were not treated like other citizens accused of violent crimes. In other words, there was one law for the Security Forces and another law for everyone else. At worst the arrangements were illegal since they have no legal basis and even if not illegal, then these measures indicate a willingness at the top of the justice system to bend the law when required.

5.70 In relation to the European Convention [679] there is 'clear authority from the domestic courts the RMP investigations, when judged by the standards of 1971-72 did not meet legal requirements under Article 2'.[680] Pablo de Grieff, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated that the 'impunity gap in Northern Ireland does not come so much from early release as from apparent selectivity in the deployment of prosecutorial resources'.[681]

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[677] It is not known whether the Chief Constable in Northern Ireland had similar influence on the prosecution process with access both to the DPP (after 1972) and to the Attorney General when one of his men stood accused of murder.
[678] Hamill (n630) 167.
[679] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 10 January 2018]
[680] In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80 quoted in CAJ response to the UN 7th Periodic Report (n563)
[681] UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland*, 17 November 2016, A/HRC/34/62/Add.1, available at: <http://www.refworld.org/docid/58b9583b4.html> [accessed 10 April 2018]

5.71 The investigation and the prosecution process were far from either 'normal' or transparent. For the soldiers on the street, the fact that they knew they were unlikely to be convicted of a crime must have undermined the legal constraints on their behaviour.

## The Role of the Coroners Courts

5.72 The influence of an independent-minded coroner in Northern Ireland, which could have provided some balance in the system, had been gradually eroded. The process began more than ten years before British troops arrived on the streets of Northern Ireland when Coroners Courts lost their ability to deliver a verdict of unlawful killing at inquests. Further limits were placed on the Coroner in 1980 following the recommendations of the Broderick Report.[682] These amended procedures for coroners were introduced in Northern Ireland but nowhere else in the United Kingdom. They removed the possibility of the coroner returning an open verdict. An open verdict is given when the coroner believes that the victim did not kill himself but does not know who did. Instead the new procedures meant that the coroner could only return a 'finding' saying 'when, where and how that person had died'.[683]

5.73 In addition, the 1980 amendments also removed the obligation from coroners in Northern Ireland to call everybody considered 'expedient' to the death. This change in the law meant that soldiers involved in fatal shootings could no longer be compelled to appear before the coroner at an inquest. Instead they could provide a written statement to the court. Mark Urban also claims that before officers from the Criminal Investigations Department (CID) interviewed any soldiers, the soldiers went into consultation with Army Legal Officer who remained with the soldiers throughout the interview with CID.[684] Urban claims that the soldiers statements were prepared under the guidance of the Army Legal Officer who knew how to write a statement which would persuade the coroner's

[682] Urban (n540) 74.
[683] ibid.
[684] ibid 75.

jury that the amount of force used had been reasonable in the circumstance.[685] This he claims is why so many soldier's statements mentioned seeing the victim making 'turning and reaching movements, assumed to be attempts to grab either a gun or a remote control device for a bomb'.[686]

5.74 The significance of these various amendments to the legislation was that the decision to prosecute a member of the Security Forces would be made by the DPP that in turn would be based on a police investigation. 'The possibility of an independent-minded coroner influencing such a decision was removed.' [687] The suspicion is that the decision was yet again loaded against prosecuting soldiers.

## The Use of Civil Actions for Damages

5.75 One way of trying to assess the extent to which the criminal law exercised restraint on soldiers is to look at civil actions for damages and compare the outcomes in both jurisdictions. In other words, assuming that the low conviction rates for soldiers was the result of a failure of the criminal justice system to properly hold soldiers to account, then a better measure of criminal behaviour by soldiers may be the number of awards made in civil cases.

5.76 The unjustified use of force may result in a criminal prosecution against an individual soldier but alternatively it may result in an action for damages against the MOD in which a soldier's alleged tort will be the basis of the action. So even if there is no criminal prosecution or the defendant is acquitted in a criminal trial, the defendant may still be held liable in tort.[688] Huw Bennett claims that civil litigation is 'a better proxy measure for assessing military misbehaviour'.[689] One of the reasons for this is that in a civil action it is for the victim or his family to decide whether to bring proceedings. Whereas in criminal proceedings, the decision to prosecute is made behind closed-doors and very rarely involves the victim or his family's wishes.

[685] ibid.
[686] ibid 76.
[687] ibid 74.
[688] The defendant in a civil action would be the Ministry of Defence.
[689] Bennett (n549) 279.

5.77 However, using awards made in civil cases as a measure of criminal behaviour requires caution. There is an evidentiary difference between criminal and civil law. In criminal cases the bar is set much higher. The defendant can only be convicted where the evidence proves guilt beyond reasonable doubt. In civil cases the standard is lowered to the balance of probabilities. In addition, out-of-court settlements, with no acceptance of liability, may be attractive to the MOD because they are cheaper than running a trial and produce less adverse publicity. So, equating such payments with guilt could be misleading.

5.78 That said, during the Troubles a substantial number of civil proceedings were issued against the MOD for alleged abuses committed by members of the Security Forces. It was described as 'A Full–scale Campaign of Harassment by Claims.'[690] Settlements were usually made without any admission as to liability. During the period up to 1975, the MOD had settled 410 cases out of the 6,000 claims it had received. The figure of 410 settlements compared to the figure of less than 100 convictions provides a very different picture of the level of offending within the military.

5.79 The distinction between the civil and the criminal proceedings is brought into sharp relief in the case of Patrick McElhone.[691] In this case a soldier was acquitted of shooting Patrick McElhorne, who had no connections with any paramilitary group, when he attempted to escape from a British Army patrol in County Tyrone in August 1974. By contrast, in August 1975 the Secretary of State for Defence agreed to pay compensation to the family of Patrick McElhorne. This was because 'Crown Counsel advised that a civil court would find for the plaintiff on the balance of probabilities, and recommended settling out of court.'[692]

[690] The National Archive (TNA): WO 32/21780: LM from Mr. Parkin, Head of C2 (AD), PUS (A), 'Legal problems - Northern Ireland', 6 December 1971.
[691] *Attorney General of Northern Ireland's Reference Case* ALL ER (n626) 937.
[692] Bennett (n549) 296.

5.80 It has been suggested actions for damages 'appear to have replaced criminal prosecutions as the usual means of holding the user of weapons accountable'.[693] The use of actions for damages may have been a method of getting compensation for the victim's family and hurting the MOD through negative publicity and costs but it is more difficult to claim that it held the individual soldier to account or that the possibility of such action could influence the behaviour of a soldiers patrolling the streets or manning a checkpoint.

5.81 Looking at the civil awards made does tend to undermine the government's position that soldiers acted within the law. It also adds weight to the contention that the ordinary criminal law was inadequate when dealing with soldiers standing accused of crimes committed while on duty. The reasons for its inadequacy are not just the way the law was formulated but also includes the fact that the investigation process lacked independence and transparency, as did the decision to prosecute. In addition, the courts were sympathetic to the soldier's position when soldiers opened fire. Overall it does seem clear that the ordinary criminal law did fall short of the ideal model – in exercising control, providing guidance and giving the prosecuting authorities a clear framework in which to produce satisfactory outcomes in each case.

5.82 This chapter examined the extent to which the law held individual uniformed soldiers patrolling the streets of Northern Ireland to account. There is evidence to suggest that the legal framework and the entire process from investigation to prosecution before a Diplock Judge, made successful prosecutions of soldiers accused of serious offences more difficult than they ought to have been. Huw Bennett argues that this was well understood by the soldiers 'who knew that their chances of getting away with it were reasonably good'.[694] The suggestion is that because soldiers understood this to be the case, they were less likely to be constrained by the law. The next chapter will look at the extent to which the law regulated covert operations undertaken by the Security Forces.

[693] Peter Rowe, 'Legal Aspects of the Use of the Army in Maintaining Order' (1987) 26 Military Law and & Laws of War Review 551, 556.
[694] Bennett (549) 290.

## Chapter 5: The Legal Basis of Covert Operations in Northern Ireland during The Troubles

6.1 In addition to overt operations the British Army and the RUC were also involved in covert operations. From the earliest days of the Troubles the British authorities were keen to penetrate the IRA's network.[695] Initially the British Army, in collaboration with the RUC, gathered intelligence to forestall terrorist activities and carry out arrests, but after the introduction of internment in August 1971 the RUC left these tasks to the British Army. In August 1971, each of the three brigades stationed in Northern Ireland set up a Military Reaction Force (MRF) to take over clandestine intelligence gathering. In late 1972, the undercover activity was centralised and the 14th Intelligence Company was established under the direct control of General Officer Commanding Northern Ireland (GOC NI). Its role involved surveillance and undercover patrols. It originally had 120 personnel but this number grew to around 250 by the late 1980s.[696] The 22nd Special Air Service (SAS) were sent into Northern Ireland (South Armagh only) on the 6 January 1976.[697] Later that year the SAS were deployed across Northern Ireland. The SAS operated mainly in uniform undertaking close observation patrols or were deployed as 'snatch squads' to arrest terrorist suspects.[698]

6.2 The numbers involved in clandestine operations in the British Army were relatively small compared to the number of soldiers and policemen in uniform. Evelegh claims that in 1974 the Metropolitan Police had 18 per cent of its strength operating in plain clothes and makes the point that if the British Army was expected to take on the role of the police then a similar percentage would be needed for the Security Forces to be effective.[699] This was not achieved. He

[695] Paddy Hillyard, Margaret Urwin, 'Shining a light on deadly informers: The de Silva Report on the murder of Pat Finucane' (2013) 23(2) Statewatch Journal at <http://database.statewatch.org/article.asp?aid=33252> accessed at 4 May 2017.
[696] Geraint Hughes, 'The use of undercover military units in counter-terrorist operations: a historical analysis with reference to contemporary anti-terrorism' (2010) 21(4) Small Wars and Insurgencies 561, 573.
[697] Mark Urban, *Big Boys Rules: The SAS and the Secret Struggle against the IRA* (Faber and Faber 1993) 4 states that the SAS had been deployed in Northern Ireland in 1969 and 1974.
[698] Hughes (n696) 573.
[699] Robin Evelegh, *Peace Keeping in a Democratic Society: The lessons of Northern Ireland* (C. Hurst & Co. (Publishers) Ltd. 1978) 30.

suggests the numbers were low principally because there was legal uncertainty about the use of soldiers operating in civilian clothes within the United Kingdom. Evelegh claims that the confusion arose because soldiers prosecuting a war against an external enemy are required to be in uniform and that requirement was wrongly extended to soldiers dealing with domestic terrorism. He suggests that had the question of legality been put before a court then the court would have certainly determined that the practice was lawful and the British Army could have better utilised this 'highly effective mode of operation'.[700] The point he is making here is that the legal framework failed to provide effective access to the courts. The British Army believed that it was operating in a 'legal grey zone' and chose to be cautious. By doing so it could be argued that the British Army displayed an uncharacteristic respect for the law.

6.3 Overt operations involve foot-patrols, vehicle checkpoints, aerial surveillance, and sentries in public places. Covert operations, on the other hand, involve clandestine intelligence-gathering missions.[701] The Pattern Report describes covert policing as governing interception, surveillance, informants and undercover operations. The Regulation of Investigatory Powers Act 2000 governs the interception of communications, surveillance, as well as the use of agents and informants. These clandestine activities were undertaken within the British Army by undercover units,[702] principally the Force Research Unit (FRU) and the 14th Intelligence Company,[703] alongside uniformed members of the SAS and Close Observation Platoons (COP) that operated within each battalion stationed in Northern Ireland. In addition, after 1976 the Royal Ulster Constabulary Special Branch (RUC SB)

[700] ibid.
[701] Chris Patten, *A New Beginning: Policing in Northern Ireland: The Report of the Independent Commission on Policing for Northern Ireland, A New Beginning: Policing in Northern Ireland* (HMSO 1999). (The Patton Report)
[702] The Security Service in 1969 did not exist in any legal sense or constitutional sense but nevertheless played a role in agent running in Northern Ireland. However, 'there is no way of being able to safeguard against the agency operating outside of the law since it had no effective external guidance to make clear the extent to which their agents could be permitted to engage in criminality in order to gather intelligence.' See Desmond de Silva, *The Report of the Patrick Finucane Review* (HC 802-11, 2012) 6.
[703] Hughes (n696) 565.

also undertook undercover operations. In fact, RUC SB had the largest network of informers in Ulster after 1976.[704]

6.4 The aim of intelligence-gathering operations is to collect human intelligence (HUMINT) and this is done in three ways. The first is through reconnaissance and surveillance missions. Individuals, their homes, vehicles and weapons caches are placed under secret observation. This could involve electronic surveillance such as phone tapping or cameras, static surveillance from observation posts or by mobile surveillance teams tracking targets either on foot or in vehicles. In addition to surveillance missions, HUMINT can be gathered by undercover members of the Security Forces either infiltrating the terrorist organisation or by recruiting informants from within terrorist organisations.

6.5 These legitimate activities are not to be confused with 'deniable' operations such as 'false-flag'[705] missions and assassinations, both of which are clearly illegal. But this distinction between legitimate and illegitimate operations is difficult to draw if the covert operations are not conducted under a clear legal framework.

6.6 In Northern Ireland, there was also a pervasive view that undercover units were less professional and less disciplined than soldiers in uniform and were consequently viewed with suspicion. The consensus seems to be that the use of clandestine units 'pose[d] problems of command, control, and accountability'.[706] The argument is that lines of administrative responsibility for these covert units become blurred and consequently there was often no clear chain of command. Given the covert nature of the activities, without a clear chain of command and a defined legal framework it has been suggested that 'there is an increased risk of Security Forces units "going rogue" with grave consequences for the stability of a democracy'. [707] Nevertheless, Evelegh states that 'Most of the vital arrests,

[704] Urban (n697) 92.
[705] A false-flag mission is where an attack is blamed on the enemy.
[706] Hughes (n696) 569.
[707] ibid 570.

identifications and locations of terrorists were largely due to the tiny numbers of soldiers permitted to operate, under heavy restrictions, in plain clothes.'[708]

6.7 Daniel Holder describes two approaches to agent running.[709] The first is the 'law enforcement' approach and the second he describes as the 'counter-insurgency' approach. In the law enforcement approach agents are used by the State to gather information that is then used to save people's lives and in time bring those involved in criminal activity before a court. Informants are prohibited from involvement in serious crime, the intelligence they gather is used to protect and warn people under threat, and all investigations are carried out to ensure the law is enforced. In addition, there is independent oversight and a complaints process in place.

6.8 This approach is distinguished from the 'counter-insurgency' approach where one life is worth more than another and some people are protected and others are not. 'Informants are either, permitted, facilitated or directed to be involved in crimes including murder.'[710] This is done on the understanding that those crimes will not be fully investigated by the State, allowing the informants to operate with impunity. The informants are in effect operating above the law. This approach could involve strengthening those paramilitary organisations with objectives that align with the States objectives, as well as trying to defeat paramilitary organisations with a different agenda.

6.9 The kind of intelligence that is being sought through clandestine operations falls into three broad categories. The first is 'political intelligence' which includes identifying the political aims of the relevant organisation. The second is 'operational intelligence' which includes most importantly intelligence on

[708] Evelegh (n699) 30.
[709] Daniel Holder, 'Covert policing and collusion, running informants and the human rights framework' <www.caj.org.uk/files/2016/5/12/Covert_Policing_and_Ensuring_Accountability_Ten_Years_on_from_the_Corey_Collusion_Inquiry_Reports_Now.pdf> accessed 12 February 2017.
[710] ibid.

planned terrorist attacks. The third is 'criminal intelligence' which includes evidence that can be used to support a successful prosecution.[711]

6.10 Covert operations present the State with an effective method of fighting terrorists. 'The British counter-insurgency experience has demonstrated that at the heart of every eventual campaign 'success' lay an efficient, decentralised and well-integrated intelligence network.' [712] It has been variously described as the 'lifeblood of anti-terrorism operations'[713] and 'a potent weapon for the state in countering terrorism of the kind that prevailed during the Troubles.' [714] The Army's Manual of Land Operations Volume III – Counter-Revolutionary Operations (Northern Ireland is defined as a counter-revolutionary conflict) was published in 1977 and it states that 'intelligence is the key to success'.[715]

6.11 Using intelligence gathered covertly can paralyse a terrorist organisation. The Security Forces can frustrate planned attacks by discovering weapons caches and arresting ringleaders, in addition to making communications between terrorists difficult. What is also true is that even a hint of treachery within a terrorist organisation can cause the terrorists to turn on one another. Mark Urban makes the point that 'young volunteers joining the IRA in the 1980s were almost as likely to die at the hands of their own comrades through accusations of informing as they were to be killed by the SAS'.[716] Urban quotes some statistics relating to deaths of IRA volunteers by other members of the IRA. He claims that between 1979 and 1981 the IRA killed eight informers whereas between them the RUC and the Army killed just five IRA members.[717] He goes on to say that between '1978 and 1987 at least 24 informers or members suspected of informing were killed by the Provisionals which is almost the same number [that] were killed by

[711] Hughes (n696) 573.
[712] Andrew Mumford, 'Minimum Force meets brutality: Detention, Interrogation and Torture in British Counter-insurgency Campaigns' (2012) 11(1) Journal of Military Ethics 10, 12.
[713] Urban (n697) 92.
[714] Desmond de Silva, *The Report of the Patrick Finucane Review* (HC 802-11, 2012) 6 (The de Silva Report)
[715] Urban (n697) 19.
[716] ibid 244.
[717] ibid 102.

the SAS in the same period'.[718] Of course, the Security Forces ran covert operations against both Republican and Loyalist paramilitary organisations, but the IRA was the primary focus of British Army covert operations.[719] The IRA understood the threat posed by informers and agents. Sinn Fein published an article in 1974 entitled 'Loose Talk can be Fatal' in its monthly newspaper 'An Phoblacht' or Republican News. In the article it was conceded that, 'The greatest weapon England has is that of the informer. Without [them] it is possible that the people of Ireland would have had full control over their country a long time ago.'[720]

6.12 Geraint Hughes makes the point that because of the small size of PIRA even small successes in relation to recruitment of informers translated into 'disproportionate rates of attrition'.[721] The numbers of volunteers in the IRA (and its splinter groups) did not remain static over the duration of the Troubles and in any case the numbers involved are disputed. Moloney claims that 'In 1969 the entire movement would have been hard pressed to mobilise more than 50 volunteers.'[722] However, after that date the figures seem to hover in the low hundreds. The figure of two hundred and fifty to three hundred and fifty members has been suggested by Urban,[723] whereas Geraint Hughes quotes a slightly higher figure of three to four hundred members.[724] In 1972 during Operation Motorman, Tom Siegriste claims that in West Belfast just 50 IRA 'regulars' faced more than 8,000 British troops.[725] Martin McGuiness on the other hand is quoted as saying that 'throughout the Troubles '10,000 people had been through the ranks of the IRA over the years'.[726]

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[718] ibid.
[719] James Rennie, *The Operators, Inside 14 Intelligence Company –The Army's Top Secret Elite* (Century 1996) 191.
[720] An Phoblacht 'Loose Talk can be Fatal' January 1974 quoted in Thomas Leahy, 'The Influence of Informers and Agents on Provisional Irish Republican Army Military Strategy 1976-1994' (2015) 26(1) Twentieth Century British History 122, 123.
[721] Hughes (n696) 576.
[722] Ed Moloney, *A Secret History of the IRA* (Penguin Books 2003) 102
[723] Urban (n697) 32.
[724] Hughes (n696) 576.
[725]Tom Siegriste, *SAS Warlord 'Shoot to kill'* (Frontline Noir Publishing 2010) 208.
[726] Moloney (n722) xiv.

6.13 The problem with handling informants is that it will inevitably involve unenviable ethical dilemmas. Each stage of the process presents different dilemmas. The first stage involves dilemmas relating to the recruitment of informers. The second stage involves ethical issues relating to both the extent to which 'handlers' can ignore the criminal activity of their informants, and also what measures can be taken by 'handlers' to protect their agents from discovery. The third stage of the process involves dilemmas relating to the way in which intelligence is acted on to effect the arrest of suspects without compromising the agent.

## Recruitment of Informants

6.14 In Northern Ireland informants were generally recruited following their arrest.[727] Once in police or British Army custody, the Security Forces offered those they believed were able to provide valuable information on the IRA their freedom, in return for becoming an informer. If the offer was declined, the Security Forces might then turn to other forms of blackmail as a method of persuasion.[728] The blackmail might come in the form of the Security Forces threatening to let it be known that the detainee was working as an informer, alternatively the detainee could be blackmailed using information gained through covert surveillance.

6.15 The Kincora Boys' Home Scandal has been cited as an example of where blackmail gained through covert surveillance was used to persuade individuals to become informants.[729] The scandal broke on the 3 April 1980 when three members of staff were charged with acts of gross indecency on the boys at the home. William McGrath was one of those charged (and later convicted). It emerged that he was the leader of a loyalist paramilitary group called TARA.[730] TARA was an evangelical Protestant paramilitary organisation. The suspicion is that the abuse at the home was allowed to continue in order to protect a valuable

[727] Michael O'Connor, Celia Rumann, 'Into the Fire: How to avoid getting burned by the same mistakes made fighting terrorism in Northern Ireland' (2003) 24(4) The Cardozo Law Review 1657, 1683.
[728] Urban (n697) 104.
[729] ibid 57.
[730] Martin Melaugh, CAIN: Chronology of the Conflict 3 April 1980 CAIN at <www.ulst.ac.uk/othelem/chron/ch80.htm> accessed 17 March 2017.

source of intelligence, namely McGrath. Mark Urban claims that the 'Security Service (MI5) blocked moves to stop the abuse because it provided them with valuable blackmail material to be used against a member of a loyalist terrorist group who worked there and was one of the alleged abusers'.[731] He also claims that the Army 'had knowledge of homosexual abuse of youths at the Kincora boys' home'[732] and surmises that the British government knew about the abuse at this home and 'misled Parliament about just how much the authorities knew about the abuse at the home'.[733] This would mean that the Security Forces used general criminal activity, in addition to terrorist related activity, as leverage to persuade individuals to become informants. Attempting to recruit someone to act as an informant in not against the law *per se* but it would be if it puts someone's life at risk or if the attempted recruitment involved blackmail.

6.16 On the 15 January 1982 James Prior, the Secretary of State for Northern Ireland, announced the setting up of a Committee of Inquiry into the sexual abuse scandal of children who lived in the Kincora Boys' Home in Belfast. That Inquiry collapsed after one day due to a lack of adequate powers to investigate. Rumours about Kincora persisted and in 2015 there were further revelations that two military intelligence officers, Collin Wallace and Brian Gemmell 'tried to expose the scandal but were warned off by a named officer in MI5'.[734]

6.17 It was announced on the 31 May 2016 that there would be another inquiry by the Historical Institutional Abuse Inquiry (HIA) chaired by Sir Anthony Hart into the abuse scandal and the emerging allegations of a cover up by elements of the British State. However, in 2017 the report by Sir Anthony Hart found no credible evidence that the intelligence services and the British Army were aware of a pedophile ring at the home, or that members of the intelligence community were

[731] Urban (n697) 57.
[732] ibid 57.
[733] ibid.
[734] Liam Clarke, 'I met Britain's Spymaster Maurice Oldfield at Kincora, says abuse survivor Richard Kerr' *Belfast Telegraph* (Belfast, 24 July 2015) <https://www.belfasttelegraph.co.uk/news/northern-ireland/i-met-britains-spymaster-maurice-oldfield-at-kincora-says-abuse-survivor-richard-kerr-31400247.html> accessed 17 March 2017.

blackmailing abusers to spy on fellow Ulster Loyalists. However, Henry McDonald claims that this is unlikely to be the end of the matter.[735]

## Handling of Informants

6.18 It is also clear that informants, if they are to provide useful information on planned attacks, need to be part of those planned operations. In terms of handling agents, the de Silva Report acknowledged that:

> In order to maintain cover, it follows that agents would be required of necessity to engage in criminal conspiracies with their terrorist associates (whilst in theory, seeking to help the security forces to frustrate the realisation of these plans).[736]

In the de Silva Report it also states that 'All former intelligence officers stressed that an agent could only provide the most valuable, and potentially life-saving intelligence if they were infiltrated into the heart of the terrorist group.'[737] Daniel Holder quotes from meeting minutes taken on the 13 March 1987 between the RUC and the Northern Irish Office explaining the modus operandi of informant handling. The practice was of 'placing/using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution'.[738] In other words, the informant would need to be allowed to continue his terrorist activities in order to maintain his cover. Other commentators have gone further and suggested that in order to be successful, the informant 'must commit a wide range of criminal activities from robberies to murder' which may or may not be linked to terrorism.[739]

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[735] Henry McDonald, 'Why we haven't heard the last of the Kincora sex abuse allegation' *Belfast Telegraph* (Belfast, 7 February 2017) < https://www.belfasttelegraph.co.uk/opinion/news-analysis/why-we-havent-heard-the-last-of-the-kincora-sex-abuse-allegations-35428281.html. > accessed 17 June 2019.
[736] The de Silva Report (n714) 6.
[737] ibid.
[738] Holder (n709).
[739] Paddy Hillyard, 'Perfidious Albion: Cover-up and Collusion in Northern Ireland' (2013) 22(4) Statewatch Journal 1, 3.

6.19 The next issue is that once the informant is in place and providing useful intelligence, what measures can the Security Forces take to protect their source. There are many claims that the Security Forces turned a blind-eye to serious crimes and even pointed suspicion towards others, in order to protect valuable informants. For example, Rosie Cowan makes the claim that an informant in the IRA, Alfredo 'Scap' Scappaticci, codenamed 'stakeknife', was involved in the murders of up to 40 loyalists, republicans, police officers and civilians and that dozens of people died to keep him alive.[740] In addition, it has been claimed that the Force Research Unit became aware that a Loyalist group planned to assassinate a leading member of PIRA who was said to be of Italian descent. Fearing Scappaticci was in danger, the Force Research Unit 'directed the killers away from Scappaticci towards an ex-Republican terrorist called Francisco Notarantonio'.[741] These do not appear to be isolated incidents. O' Conner points out that a key finding of the de Silva Inquiry was that Brian Nelson was an agent and UDA member who was directly involved in 4 murders and 10 attempted murders but was protected by RUC Special Branch.[742]

6.20 The Home Office produced guidelines for the police on the use of informers. According to Mark Urban, the Home Office guidelines stated that if an informer revealed plans to commit a serious offence then the police should not allow the plan to go ahead nor should police officers ever mislead a court in order to protect an informer.[743] In addition, the guidelines made it clear that there should be no blanket immunity for informers.[744] Although these guidelines were in place it was felt that it would be inappropriate for the RUC to be bound by them. [745] However, the guidelines were not replaced with more suitable guidelines. Instead, there was no regulation at all. In other words, a 'legal black hole' emerged. Hillyard claims

[740] Rosie Cowan, 'He did the IRAs dirty work for 25 years and was paid £80,000 a year by the government' *The Guardian* (London, 12 May 2003) <http://www.theguardian.com/uk/2003/may/12/northernireland.northernireland1> accessed 12 February 2017.
[741] Hughes (n696) 579.
[742] Paul O'Connor, 'Deadly intelligence and the rule of law' <http://www.caj.org.uk/files/2016/5/12/Covert_Policing_and_Ensuring_Accountability_Ten_Years_on_from_the_Corey_Collusion_Inquiry_Reports_Now.pdf> accessed 12 February 2017.
[743] Urban (n697) 107.
[744] ibid.
[745] Hillyard (n739) 3.

that because of this there was 'in effect there was no rule of law in Northern Ireland'.[746]

6.21 The de Silva Review stated that it had 'established that there was no adequate framework in Northern Ireland in the late 1980s in relation to agent running'.[747] The Review went on to explain that the three agencies running agents, the RUC SB, the Force Research Unit and the Security Service, all operated under their own separate regimes. It concluded that:

> RUC SB had no workable guidelines; the FRU were subject to Directives and Instructions that were contradictory; the Security Service received no effective guidance to make clear the extent to which their agents could be permitted to engage in criminality in order to gather intelligence.[748]

6.22 The de Silva Review points out that successive British governments knew that agents were being run by the intelligence agencies in Northern Ireland without a legal framework being in place 'despite repeated calls from senior RUC, Security Service and (latterly) Army officers to address this issue'.[749]

6.23 The overall conclusion was that 'There was a willful and abject failure by successive British governments to provide the clear policy and legal framework necessary for agent-handling to take place effectively and within the law.'[750] In terms of domestic law, until the introduction of the Regulation of Investigatory Powers Act 2000 (RIPA) there was no legislation governing the use of informants. However, human rights laws outline a range of provisions that are relevant to covert operations.[751]

[746] ibid.
[747] The de Silva Report (n714) para 23.
[748] ibid.
[749] ibid para 24.
[750] ibid para 23.
[751] These are detailed later in this chapter at para 6.63-6.64

## Undercover Military and Police Units

6.24 In addition to gathering intelligence using informers, undercover military units, acting on the intelligence provided by agents, were also tasked with making arrests. It was the use of lethal force by covert units when attempting to make an arrest that has proved to be very controversial.

6.25 The dilemma faced by these undercover units when tasked with making an arrest, was when was it appropriate to use lethal force. Democratic norms demand that once identified, terrorist suspects should be arrested and charged and subsequently brought before a court. But attempts to arrest suspects can, and frequently did, end in death in Northern Ireland - either because the suspects resisted arrest or because the soldiers were following orders to kill them. The allegations of a shoot-to-kill policy in Northern Ireland still persist in some quarters. But what does a shoot-to-kill policy entail?

6.26 What is clear is that a shoot–to-kill policy does not mean that once the decision to open fire has been taken then there is a further decision about where to aim the bullets – that is whether to aim for vital organs or aim to hit arms or legs. The British Army firearms training stresses the need to use the weapon to fire at vital organs and continue firing until the target is no longer a threat.

6.27 Instead, the discussion about a shoot-to-kill policy usually has two elements. The first concerns the reason why the soldiers were at the scene in the first place. Were they at the scene because they had forewarning of terrorist activity, in which case lethal force might not have been the only option or did they come across the terrorists whilst out on routine patrol? The second concerns the necessity to use firearms once a confrontation between the Security Forces and the terrorists was in progress, and this generally comes down to whether the terrorists were armed.

6.28 The Army Manual ‘Land Operations Volume III – Counter Revolutionary Operations describes an ambush as a surprise attack by a force lying in wait upon

a moving or temporary halted enemy'.[752] The Army Manual goes on to explain that an ambush should be executed by positioning the main body of soldiers so that they have clear view of the 'killing area' and positioning a smaller body of soldiers to cut-off any enemy attempting to escape.[753] An ambush of this type would clearly be illegal.

6.29 Mark Urban found only one published example of an SAS order made in Northern Ireland which included the word ambush.[754] Urban claims that such an order would have been interpreted 'one way and only one way by a soldier in the British Army'.[755] Urban then goes on to detail various arrest attempts that ended in dead PIRA members and raises the question whether or not those PIRA members died in unlawful ambushes. Urban points out that 'a small cadre of SAS and surveillance operators were responsible for the great majority of IRA deaths in recent years'.[756] However, even if some terrorists were killed in unlawful circumstances, there is no evidence that these incidents formed part of a wider policy. There is no suggestion that every IRA volunteer was at risk of being killed in an unlawful ambush. One former soldier, quoted by Andrew Sanders, claims that members of the Security Forces 'knew who the 'names' were and where to get them'.[757] Campbell and Connolly quote from an account given by a member of the IRA, 'in '72 it was not a secret Army (…) everybody in the district knew who was in the IRA'.[758] If this were case it would lend weight to the theory that there was no ambush policy in Northern Ireland, at least in the early years, given the small numbers of IRA members that died in this way.[759]

6.30 However, the role of undercover units in the British Army remains contentious. Hughes, for example, claims that the Military Reaction Force (MRF) not only

[752] *The Amy's Manual of Land Operations* (HMSO 1977) vol III quoted in Mark Urban (n689) 161.
[753] ibid.
[754] Urban (n697) 162.
[755] ibid.
[756] ibid 246.
[757] Andrew Sanders, 'Operation Motorman (1972) and the search for a coherent British counterinsurgency strategy in Northern Ireland' (2013) 24(3) Small Wars and Insurgencies 465, 477.
[758] Colm Campbell, Ita Connolly, 'Making War on Terror? Global Lessons from Northern Ireland' (2006) 69(6) The Modern Law Review 935, 953.
[759] In later years, the PIRA reorganised its structure into small cells and the problem of identifying who was involved became more difficult.

murdered suspects involved in terrorist activities but also killed unarmed Roman Catholics who had no terrorist involvement at all, in a campaign of sectarian violence.[760] Tom Siegriste, a former member of the MRF, confirms that the MRF were involved in assassinations.[761] He claims that the MRF operated what was known as a 'shoot and scoot' policy in Northern Ireland.[762] He claims that the 'MRF even wrote their own Standard Operating Procedures so that they could virtually make it up as they went along'.[763] The 'shoot and scoot' policy appears not to have presented him with any personal moral dilemmas but he does state that one of the problems with the policy was that shooting unarmed men tended to look rather 'unfair'.[764] He also claims that MI6 ordered him to assassinate Gerry Adams on the 23 June 1973.[765] Brice Dickson has also suggested that the British Army's Force Research Unit, based at Thiepval Barracks in Lisburn, might 'have been involved in the killing of at least 14 Catholics between 1987 and 1991'.[766]

## Allegations of Collusion

6.31 In addition to relying on intelligence gathered from informers, the Security Forces were also involved in collusion. The term collusion is not defined legally. In general, it is used to describe collaboration between the State and paramilitary groups. It involves any or all of the following activities, 'supply of information, resources and weapons to paramilitaries, failing to investigate activities or enforce the law against paramilitaries, or the directing or facilitating of killings and or other activities or paramilitaries'.[767] In the Stephens Inquiry the term collusion

[760] James Hughes, 'Frank Kitson in Northern Ireland and the British way of counterinsurgency' (2014) 22(1) History of Ireland 44, 48.
[761] Siegriste (n725) 183
[762] ibid.
[763] ibid 255.
[764] ibid 183.
[765] ibid 255.
[766] Brice Dickson, 'Counter-Insurgency and Human Rights in Northern Ireland' (2009) 32(3) Journal of Strategic Studies 475, 488.
[767] Committee on the Administration of Justice, 'The Apparatus of Impunity?' Human Rights Violations and the Northern Ireland Conflict: A narrative of official limitations on post-Agreements investigative mechanisms' (Committee on the Administration 2015) 40 <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15131009/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf> accessed 17 March 2017. [CAJ The Apparatus of Impunity]

was understood to mean a wide range of behaviour from 'willful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extremes of agents being involved in murder'.[768]

6.32 In the Cory Inquiry, Judge Cory developed the concept further and stated that collusion involved connivance and the definition of the verb to connive is 'to pretend ignorance or unawareness of something one ought morally, or officially or legally oppose; to fail to take action against a known wrongdoing or misbehaviour - usually used with connive at the violation of law'.[769] Judge Cory claimed that 'any lesser definition would have the effect of condoning, or even encouraging, state involvement in crimes, thereby shattering all public confidence in these important agencies'.[770]

6.33 This broad definition of the term collusion was resisted in the Billy Wright Inquiry and instead a much narrower definition was adopted.[771] The Inquiry stated that:

> We consider that the essence of collusion is an agreement or arrangement between individuals or organisations, including government departments to achieve an unlawful or improper purpose. The purpose must be fraudulent or underhand.[772]

6.34 These inquiries along with the de Silva inquiry confirmed that the Security Forces were guilty of collusion.[773] Following on from that in June 2016 the Police Ombudsman issued a report into the 1994 Loughinisland massacre. In the report the Ombudsman concluded that Security Force collusion was a 'significant feature' in the massacre of civilians in a pub by the Loyalist UVF paramilitary group.[774]

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[768] ibid. 40.
[769] Peter Cory, Cory Collusion Inquiry Report: Chief Superintendent Breen and Superintendent Buchanan (2003) para 2.59.
[770] ibid.
[771] The Billy Wright Inquiry – Report (HC 431, 2010) (Billy Wright Inquiry Report)
[772] ibid para 1.33-4.
[773] Please see paras 6.48-6.50 for examples of collusion.
[774] Police Ombudsman for Northern Ireland 'Statutory Report: The murders at the Heights Bar Loughinisland 18 June 1994 (Police Ombudsman for Northern Ireland, 2016)

6.35 A classified draft document entitled 'Subversion in the Ulster Defence Regiment (UDR)', written by British military intelligence in 1973,[775] and understood to have been circulated at the highest levels of the British government[776] reveals that the British had suspicions about the activities of the UDR by 1973 just three years after the UDR came into being on 1 April 1970.

6.36 The UDR was formed following recommendations made in the Hunt Report (1969). The UDR was created as a non-denominational part-time force under the GOC NI. However, by 1973 the percentage of Roman Catholic members was 4%.[777] There were a number of senior full-time posts but the rest of the roles were part-time. The main tasks of the UDR were to guard strategic points through patrolling, surveillance, and manning Vehicle Check Points. The UDR were not deployed in 'hard' areas and were 'not permitted to become involved in crowd confrontation anywhere'.[778] The 7910 strong Regiment were armed with self-loading rifles and sub-machine guns.[779] The UDR were recruited locally and each applicant was security vetted.

6.37 However, the imposition of direct rule in 1972 mobilised support for the UDA. 'The UDA was formed in 1971 as an umbrella group for a variety of loyalist groups.'[780] 'The UDAs stated aim was to protect Unionist communities from attacks by Republican paramilitaries.'[781] It remained a legal organisation until 10 August 1992. At the height of its power the UDA had thousands of members and was the largest of the loyalist paramilitary organisations. 'Given an hour or two's

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<https://policeombudsman.org/PONI/files/17/17aea3d1-c4c6-4f02-8ebc-4eb39af9b168.pdf> accessed 17 July 2017.

[775] Martin Melaugh, 'Subversion in the UDR (Ulster Defence Regiment), by British Military Intelligence 1973' CAIN website at <http://cain.ulst.ac.uk/publicrecords/1973/subversion_in_the_udr.htm> accessed 17 March 2017.

[776] ibid. The document is labeled 'Draft' but the CAIN website claims that it was presented to the Joint Intelligence Committee which provides intelligence assessments for the Prime Minister and other government ministers.

[777] ibid.

[778] ibid.

[779] ibid.

[780] BBC News, 'A History of the UDA' 6 September 2011 <http://news.bbc.co.uk/1/hi/northern_ireland/8442746.stm> accessed 17 March 2017.

[781] ibid.

notice it could call 20,000 men onto the streets of Belfast.'[782] In the draft paper it is stated that joint membership of the UDA and the UDR became widespread after 1972 and the loss of UDR weapons greatly increased.[783] There were policies in place to discharge men from the UDR for membership of the UDA but identifying men with joint membership proved difficult.[784]

6.38 The draft paper defines subversion in the following way:

> a. Strong support, or membership of, organisations whose aims are incompatible with those of the UDR
> b. Attempts by UDR members to use their UDR knowledge, skills or equipment to further the aims of such organisations. [785]

6.39 The draft paper comes to the following conclusions in relation to subversion. The first is that subversion added significantly to the weapons and ammunition of Protestant extremist groups. The draft paper states that within the UDR significant numbers of men perhaps 5-15% who are, or have been, members of Protestant extremist organisations. The second is that there was no substantial leakage of documents to protestant extremist groups.[786]

6.40 What the paper goes on to state in relation to the UDR is that despite the fact that the 'first loyalties of many of its members is to a concept of 'Ulster' rather than HMG',[787] the UDR is still operationally reliable. 'Except in limited circumstances subversion in the UDR has not compromised its ability to carry out its duties.'[788] It goes further and states that any attempt now to weed out soldiers that may operate against the UDR 'would result in a very small regiment indeed'.[789] The

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[782] Moloney (n726) xiv.
[783] Melaugh (n775).
[784] In the period between November 1972 and 25 July 1973, 73 men were discharged for this reason and 35 others were placed on regular reviews and a further 20 had resigned.
[785] Melaugh (n775).
[786] De Silva claimed otherwise and noted that MI5 estimated that, in 1985, the UDA had thousands of items of intelligence material and that 85% of this was drawn from security force sources. The de Silva Report (n714) para 49.
[787] Melaugh (n775).
[788] ibid.
[789] ibid.

level of toleration that is expressed in the draft paper is remarkable. The prevailing attitude seems to be that despite high weapons and ammunition losses to Protestant extremists, this Regiment should not be disbanded.

6.41 The controversy relating to clandestine units and the use of lethal force is not limited to those in the Army. The activities of the RUC Special Branch (RUC SB) and the Security Service also remain tainted by controversy. On 11 November 1982 three members of the IRA[790] were shot dead in a car being chased by an unmarked car. As the car came to a stop one of the men managed to get out but was then fatally wounded. All three men were unarmed at the time.[791] Just weeks later on the 24 November 1982 two more people were killed near Lurgan at a hayshed that was under surveillance.[792] This incident was closely followed by another incident on the 12 December 1982 in which two IRA men were shot dead as they sat in their car at a checkpoint. Neither of the men was armed. [793]

6.42 These incidents became known as the shoot-to-kill cases and prompted a public inquiry into the six deaths. John Stalker, the Deputy Chief Constable of Greater Manchester, was tasked with heading up the inquiry but resigned before concluding his investigations. However, he did reveal in an interview with the Times in February 1988 that he there was no tangible shoot-to-kill policy in place but that the men involved understood what was expected of them and that was to pull the trigger.[794] John Stalker was replaced by Colin Sampson, but neither the Stalker nor the Sampson Reports have ever been published. The inquests into these six deaths were undertaken in 2014 and are ongoing.

## The Walker Report

6.43 The suggestion is that one of the reasons that the RUC SB and the Security Service were able to act beyond the law was that in the early 1980s the basis of policing changed in Northern Ireland. The basis of policing went from the

[790] Eugene Toman, Sean Burns and Gervaise Lurgan were killed.
[791] Urban (n697) 151.
[792] Urban (n697)
[793] Urban (n697) 152.
[794] Urban (n697) 157.

maintenance of law and order and prevention and detection of crime to the collection and collation of intelligence. This fundamental change to the basis of policing came about as a consequence of the Walker Report of 1981 that provided a blueprint for the reforms. The Walker Report, drawn up by Sir Patrick Walker, remains classified but its existence was revealed in a UTV program, 'Policing and the Police' aired in April 2001.[795] The Home Office has confirmed the existence of the Walker Report.[796] However, although this fundamental change to policing had no legal basis, it has been claimed by Hillyard that 'all Prime Ministers and Secretaries of State for Northern Ireland would have been aware of this fundamental change in policing'.[797] If this was true it suggests a high degree of contempt for the rule of law by successive British governments. It also has implications for those police officers and intelligence officers involved and their relationship with the rule of law.

6.44 As a consequence of the Walker Report all planned arrests were to be cleared by RUC SB and the decision to arrest was to be taken, by both RUC SB and CID, after the 'balance of advantage has been weighed'.[798] After arrest, charging decisions were to be delayed to allow further gathering of intelligence.[799] The Sunday Times 28 January 2007 published snippets of the Report in an article entitled 'MI5 pays for murder in Northern Ireland' which revealed that the new approach to policing included provisions to destroy records after operations had concluded and that RUC Special Branch should not disseminate all information to CID.[800] Additionally, CID required permission from Special Branch before making any arrests, or carrying out house searches, in case agents were endangered.[801] A confidential memorandum from Assistant Chief Constable John

[795] A lightly redacted version of the Walker Report has now been released (2018) by the Police Service of Northern Ireland.
[796] Freedom of Information Request response from the Police Service Northern Ireland reference F-2016-00160.
[797] Hillyard (n739) 2.
[798] The Pat Finucane Centre 'The Walker Report' (The Pat Finucane Centre 23 February 1981) <www.patfinucanecentre.org/policing/walker-report> accessed 17 March 2017. (Pat Finucane: The Walker Report)
[799] ibid.
[800] Liam Clarke, 'MI5 pays for murder in Northern Ireland' *Sunday Times* (London, 28 January 2007).
[801] Pat Finucane: The Walker Report (n798).

Whiteside surfaced in February 1981.[802] The Whiteside memorandum ordered that all informers be handled by Special Branch where possible and more importantly members of paramilitary groups who had been recruited as informants were not to be arrested no matter what crimes they had committed without consultation with Special Branch.[803]

6.45 This change gave supremacy to RUC Special Branch. It gave Special Branch the power to decide who saw the intelligence provided by informers which in turn gave Special Branch control over who was to be arrested and who was to be protected. And at the center of the new intelligence-led policing policy were informers. Hillyard argues that, 'They became the backbone of the new policing strategy, whatever they did, from murder to exhortation, they were to be protected at any cost.'[804]

6.46 The change to the basis of policing, following the implementation of the recommendations made in the Walker Report, looks like a very clever, yet cynical, plan to allow the Security Forces to continue using and protecting informants no matter what offences they committed. It was designed to leave no paper trail and as one senior officer in the Billy Wright Enquiry explained, it had 'plausible deniability' built in from the beginning.[805] It has led some to comment that 'it was a system specifically devised to permit State agents to murder with impunity'.[806] Some have gone further and suggested that the Security Forces used loyalist gunmen to target and murder IRA members.[807] Davies claims that MI5 and RUC SB worked together to direct both Loyalist and IRA terrorists to kill one another.[808] Ed Moloney makes the point that intelligence-led policing also had the

[802] Hillyard (n739) 2.
[803] ibid.
[804] ibid.
[805] Billy Wright Inquiry Report (n771).
[806] Hillyard, Urwin (n695) 4.
[807] Nicholas Davies, *'Ten-Thirty-Three: The Inside Story of Britain's Secret Killing Machine in Northern Ireland* (Mainstream Publishing 1999) 16.
[808] Nicholas Davies, *Dead Men Talking: Collusion, Cover-up and Murder in Northern Ireland's Dirty War* (Mainstream 2005) 16.

objective of manipulating the leaders of paramilitary groups and consequently their policies and ideological aims.[809]

6.47 The Walker Report recommended that the Security Forces develop a system that operated outside of the rule of law, leaving no paper trails, with no oversight mechanism in place and, of course, no complaints process. These changes subverted the normal democratic process and gave the central role to reforming the police to the Security Service, at a time when the existence of the Security Service was denied by successive British governments.

6.48 Referring to the RUC SB, the Force Research Unit and MI5, Hillyard and Urwin paint a scandalous picture. They state that:

> These agencies all acted beyond the law, lying to their political masters, running propaganda campaigns, leaking massive amounts of sensitive information to loyalists including putting in place FRU's own intelligence officer at the heart of the UDA, ignoring threats to the lives of those they were tasked to protect, telling falsehoods in criminal trials, steadfastly refusing to arrest and prosecute known murderers but instead recruiting them as agents, and refusing to co-operate with investigations into their nefarious behaviour.[810]

6.49 Over the years there have been many public inquiries into different aspects of the security strategy used in Northern Ireland.[811] Using only evidence from these inquiries it is possible to substantiate all of the claims made by Hillyard and Urwin.[812] The Stevens Inquiry concluded:

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[809] Ed Moloney, 'The de Silva Report on Pat Finucane – Some Considered Thoughts' <https://thebrokenelbow.com/2013/03/18/the-de-silva-report-on-pat-finucane-some-considered-thoughts-part-three/> accessed on 17 April 2017.
[810] Hillyard, Urwin (n695) 2.
[811] These included the Stalker Inquiry (1984), three police inquiries by John Stevens (1989-2003), the Collusion Inquiry Reports by Justice Cory (2004) and subsequent public inquiries; Police Ombudsman investigations into Operation Ballast 2003-2007; the de Silva Report into the killing of Pat Finucane (2012).
[812] Hillyard, Urwin (n695) 2.

> There was collusion in both murders and the circumstances surrounding them. Collusion is evidenced in many ways. This ranges from the willful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to extreme agents being involved in murder.[813]

6.50 The de Silva Report concludes that RUC officers were involved in inciting loyalist paramilitaries to target Patrick Funucane[814] and provided 'intelligence to facilitate his murder'.[815] The Report concluded that there had been 'a series of positive actions by employees of the State actively furthering and facilitating his murder and that in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice'.[816] The Cory Collusion Inquiry Report quotes one document stating that 'The CC (Chief Constable) had decided that the Stevens Enquiry would have no access to intelligence documents or information, nor the units supplying them'.[817] Cory commented that:

> The willful concealment of pertinent evidence, and the failure to cooperate with the Stevens Inquiry, can be seen as further evidence of the unfortunate attitude that then persisted within RUC SB and FRU. Namely that there were not bound by the law and were above and beyond its reach.[818]

6.51 The Police Ombudsman for Northern Ireland's Office was set up in 1998 and had powers to investigate complaints against the police and carry out investigations. Referring to the previous public enquiries and reviews stated that 'the various reports had very little impact on the policies and practices within Special Branch'.[819]

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[813] Martin Melaugh, 'Stevens Enquiry: Overview and Recommendations, 17 April 2003' CAIN web site <http://www.cain.ulst.ac.uk/issues/collusion/stevens3/stevens3summary.htm> accessed 17 April 2017.
[814] The de Silva Report (n714) para 74.
[815] ibid 75.
[816] ibid 115.
[817] Peter Cory, The Cory Collusion Inquiry Report: Patrick Finucane (HC 470 2004) para 1.270.
[818] ibid.
[819] Police Ombudsman for Northern Ireland, 'Statement by Police Ombudsman for Northern Ireland on her investigation in the circumstances surrounding the death of Raymond McCord Junior and related matters (Belfast: HMSO 22 January 2007) para 33.4.

6.52 The problems identified by Stevens, Cory, the first Police Ombudsman, Nuala O'Loan, and the post-Cory public inquiries including the de Silva Report provide evidence of the enormous challenges to any reforms that sought to bring covert policing practice within international standards and the rule of law.

6.53 The reliance on informer intelligence led to the growth of so called supergrass trials. The term supergrass refers to someone 'who has participated in a number of criminal enterprises, who not only gives information to the police about them, but also agrees to give evidence in court against significant number of persons alleged to be his accomplices in crime'.[820] In return he is given immunity for those crimes for which he has provided a full confession. In other words, a supergrass is an 'accomplice who turns Queen's evidence on a grand scale'.[821]

6.54 Between 1981 and 1988, twenty-seven supergrasses emerged to give evidence against their former associates.[822] Approximately 500 people had been charged with terrorist related offences on the word of those twenty-seven supergrasses.[823] The evidence from a supergrass is:

> Evidence from an insider in the group who is in a position to know who does what, and in particular, pin-point key men in the hierarchy of terrorist organisations and operatives in such a way as to enable them to be convicted of crimes for which they would otherwise escape justice.[824]

6.55 There are clear advantages in using this evidence but relying only or mainly on supergrass evidence also presents dangers. There is the obvious moral issue of someone being granted immunity from prosecution for serious crimes, potentially more serious crimes than the crimes of those being accused on the evidence of the supergrass. A much bigger issue is that placing reliance on accomplice evidence is fraught with risk. The accomplice is a criminal and may have previous

[820] David Bonner, 'Combating terrorism: Supergrass Trials in Northern Ireland' (1988) 51(1) The Modern Law Review 23.
[821] ibid.
[822] ibid 29.
[823] ibid.
[824] ibid.

convictions for offences involving dishonesty. Even if not dishonest, heavy reliance on the evidence of one just one person whose memory over the years may have become less reliable comes with risks. There is also the possibility that the supergrass will take to opportunity to settle old scores and name innocent individuals for personal reasons. David Bonner has suggested that on top of these inherent risks there is also the possibility that the RUC will coach the supergrass with his evidence, rehearsing the delivery of the evidence and iron out any inconsistencies in the story, in order to enhance his credibility.[825]

6.56 There are potential short-term gains to be made by using supergrass evidence but there are also dangers and the supergrass system suffered a number of blows to its credibility. In addition to the fact that a number of high-profile supergrasses changed their mind at the last minute and retracted their statements, there were a number of successful appeals made by people that were convicted mainly on supergrass evidence. 'Of the 120 people convicted on the evidence of the ten principle supergrasses, 67 were released after subsequent appeals. 65 had been convicted solely on informer evidence and in two cases there had been corroborating evidence.'[826] Another 'criticism of the strategy contends that it's longer term effects in terms of loss of public confidence in the fair administration of justice (…) far out weight the short terms gains'.[827] However, although the word of informers had been discredited in the courts, the RUC continued to gather intelligence from informers in covert operations and treat the evidence gathered in that way as credible evidence.

6.57 It is difficult to assess the exact contribution made by undercover units to the conflict but the 14th Intelligence Company and the FRU did manage to penetrate PIRA and recruit senior figures. It is claimed that these included Frank Hagerty, a PIRA Quartermaster, and Alfredo Scappaticci who was head of the PIRAs Internal Security Unit. Mark Urban estimates that about 50 active Provisionals had been informers between 1976 and 1987.[828] 'This represents a very significant level of penetration - perhaps one in thirty or one in forty of the organisations

[825] ibid 34.
[826] Urban (n697) 127.
[827] ibid 35.
[828] Urban (n697) 244.

frontline membership during these years.'[829] Christopher Tuck claims that the 'progressively more effective intelligence war fought by the security forces had a significant effect on PIRA'.[830] Martyn Frampton claims that the 'security services had won the intelligence war' by 1994.[831] Ed Moloney echoes this claim stating that 'it is difficult to see how the IRA could have been more thoroughly compromised' in the 1990s.[832] Thomas Hennessey goes further and suggests that informers and agents contributed to a 'strategic defeat of the IRA by the 1990s'.[833] It has been claimed that by 1992 five out of every six planned attacks was compromised by the Security Forces and that this has been confirmed by Brendan Hughes, a former commander of PIRAs Belfast Brigade, who explained that the Security Forces were 'able to effectively stop and contain the IRA'. [834] While generally agreeing with the high levels of infiltration of the IRA overall, Thomas Leahy claims that the IRA cells in rural areas were not compromised to the same extent that they were in the cities.[835] He claims that 'rural units fought a continuing battle with security forces, and appeared to lack damaging infiltration'. [836] This would at least provide some explanation of why the successful recruitment of informers and high levels of penetration did not stop the violence.

6.58 This better understanding of the level of IRA infiltration by informers has caused some commentators to reassess how the peace process came about. Many academics and commentators had understood the peace process to be a result of a

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[829] ibid.
[830] Christopher Tuck, 'Northern Ireland and the British Approach to Counter–Insurgency' (2007) 23(2) Defence & Security Analysis 165, 176.
[831] Martyn Frampton, 'Agents and Ambushes: Britain's "Dirty War" in Northern Ireland' in Samy Cohen (ed), *Democracies at War against Terrorism: A Comparative Perspective* (Palgrave Macmillan 2008) 93-94.
[832] Moloney (n726) 336.
[833] Thomas Hennessey, 'The Dirty War: MI5 and the Troubles' in Thomas Hennessey, Claire Thomas (ed), *Spooks: The Unofficial History of MI5* from the First Atom Spy to 7/7 1945-2009 (Amberely Publishing 2009) 593-6 quoted in Thomas Leahy, 'Informers, agents, the IRA and British Counter-Insurgency, 1969 to 1998' at <https://kclpure.kcl.ac.uk/portal/files/464155751/2015_Leahy_Thomas_ethesis.pdf accessed 17 October 2017.
[834] Hughes (n696) 576.
[835] Thomas Leahy, 'The Influence of Informers, Agents on Provisional Irish Republican Army Military Strategy, 1976-94' (2015) 26(1) Twentieth Century British History 122, 125.
[836] ibid.

stalemate.[837] The stalemate argument is that both the IRA and the British government came to realise that neither side could win the conflict at either a military or political level. This realisation forced both sides to the negotiating table and made substantial compromises all round inevitable. In other words, 'the conflict was not brought to an end as a result of excellent intelligence being acquired'.[838]

6.59 The extent to which the IRA had been compromised by informers and agents has led some to question the stalemate analysis. Leahy has suggested that the IRA understood that it had become effectively crippled by informants and therefore made the decision to end their military campaign and seek a political solution. In other words, it was the informers and agents that created a trajectory of decline for the IRAs campaign of violence. Arguably justifying the British government's decision to prioritise covert operations and focus on the penetration of agents into the heart of the IRA.[839] The British government's decision to place a 'high priority on pursuing an intelligence–led approach' was confirmed in the de Silva Report.[840]

## Informants and ECHR Obligations

6.60 Although no domestic legislation existed governing the use of informants during the Troubles, the European Convention[841] does establish rights and duties relating to the recruitment and use of informants now referred to as 'covert human intelligence sources'. The most important is the right to life found in Article 2.[842]

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[837] Dickson (n766) 486.
[838] ibid.
[839] Frampton (n831) 83, 86-7. Frampton states that 'Gathering human intelligence became a central part of British strategy against the Provisionals between 1975 and 1994.'
[840] Desmond de Silva, *The Report of the Patrick Finucane* Review (HC 802-11, 2012).
[841] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 4 January 2018]
[842] Also important are Article 6, Article 8 and Article 14. Under Article 6 informants cannot act as agent provocateurs encouraging or directing others to commit offences. Under Article 8 the State is permitted to interfere with the right to a private and family life providing there is a clear legal basis for it and it is necessary in a democratic society. The interference must be proportionate to the objective pursued and undertaken for legitimate aims including in the interests of national security and the prevention of disorder or crime. Article 14 protects the exercise of ECHR rights from being

6.61 Article 2 prohibits killing except in self-defence where there is an imminent risk of loss of life. This applies equally to informants as it does to any other citizen. Under Article 2 the State has a duty to take reasonable steps to protect life. Under this obligation, the State is not permitted to play one life off against another. In other words, the State must not protect one life because it is valuable to the State and fail to protect another life on the basis that it has no value to the State. This means that the State has a duty to take reasonable steps to protect the life of its agents but at the same time it has an obligation to take reasonable steps to protect the lives of those it is aware are under threat, and these duties may conflict. For example, the State may decide to act on information provided by the informant in order to save lives, but in doing so risk revealing the identity of the informant. Being revealed or even suspected of being an informant puts that informant's life in danger. Another obligation on the State is to take all reasonable steps to investigate promptly and effectively all those involved in killings. In instances where State actors may be directly or indirectly implicated in a death there is an obligation that the investigation be impartial and duly independent from those involved. There is no exemption for an informant who is suspected of being involved in killing. Article 2 also requires that there is provision within the law allowing for the possibility of criminal prosecution of those State actors who are suspected of having acted unlawfully.

6.62 The activities of the Security Forces in Northern Ireland in relation to informants were never brought before the European Court of Human Rights. International law has the potential to constrain State action but in this case the reach of international law was limited. The United Kingdom benefited from a failure by civil society to bring forward cases and the failure of third-party States to engage with the European Court of Human Rights. It seems quite clear that the use of informants by the Security Forces was not constrained by domestic or international law.

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applied discriminately. In relation to covert operations it would conflict with Article 14 if the State sought to infiltrate a paramilitary group in order to make that group less of a threat to the State, while protecting the identities of agents who continue to be involved in violence.

6.63 However, there are attempts now to bring those responsible to account. Civil proceedings were issued in April 2015 against the MOD and Frank Kitson on behalf of the relatives of Patrick Heenan. Mr. Heenan was killed in February 1973 when loyalist paramilitaries threw a British Army-issue grenade into a minibus carrying him and 14 others. At the time of Heenan's murder, it is claimed that Kitson was a Brigadier commanding 39 Infantry.[843] He later rose to become Commander-in-Chief of UK Land Forces between 1982-1985. Kitson has been specifically named in the writ, the first of this kind whereby senior military figures have been included in relation to murders in Northern Ireland.

6.64 Frank Kitson became 'the best-known soldier in the British Army in Northern Ireland'.[844] But his experience and expertise was gained in the emergencies in Kenya, Cyprus, Malaysia and Oman. In Kenya, he had been involved with 'counter-gangs',[845] and after his appointment in Northern Ireland in 1970 Kitson set up an undercover unit called the Military Reaction Force (MRF) and put into practice his doctrine of counter-insurgency warfare that was key during British Army operations throughout the Troubles.

6.65 Kitson has been named as a co-defendant on the grounds that he and others used agents embedded in paramilitary organisations, and that they did know or that they should have known that it was reasonably foreseeable that the criminal activity could include murder. The court papers claim that Kitson is 'liable personally for negligence and malfeasance in public office' because in creating his doctrine of counter-insurgency he was 'reckless as to whether state agents would be involved in murder'.[846]

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[843] 'Brigadier Frank Kitson faces writs over role in North' *Anophoblacht* (Dublin, 4 May 2015) <http://www.anphoblacht.com/contents/24940> accessed 17 March 2017. However, Kitson was in NI from September 1970-April 1972. He was not there at the time of the murder but he is widely regarded as being responsible for the counter-insurgency strategy.

[844] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 41.

[845] Counter-gangs were British-led groups of former Mau Mau rebels who confronted their former comrades when they found them in the bush.

[846] 'General sued over Troubles death' *Belfast Telegraph* (Belfast, 24 April 2015) <http://www.belfasttelegraph.co.uk/news/northern-ireland/general-sued-over-troubles-death-31173850.html> accessed 17 April 2017.

6.66 In addition, there are a number of other current cases relating to covert operations. The first case was a civil claim by Margaret Keeley who is suing the Police Service of Northern Ireland, the MOD and Freddie Scapaticci.[847] It is alleged that Scapaticci was a British agent codenamed 'Stakeknife'. He was also head of what is sometimes referred to as the 'nutting squad', the IRAs internal security unit, and in that role, he has been linked to as many as 40 murders.[848] Margaret Keeley claims she was wrongfully arrested and falsely imprisoned in order to protect her husband who was a British agent. On her release both Mrs. Keeley and her husband were 'interviewed' by Scapaticci. The second case involves another British informant, Martin McGartland, who claims that the British failed in its duty of care towards him once it was discovered he was an informer working for the British. He was subsequently shot multiple times by the IRA but survived.[849]

6.67 In April 2015, Northern Ireland's Police Ombudsman also announced an investigation into a number of 'preventable murders'. It is alleged that these murders were perpetrated by Republican paramilitaries on individuals suspected of having acted as informants for the RUC. The allegations received by the Police Ombudsman include claims that some murders could have been prevented and that people were subsequently protected from investigation and prosecution.

6.68 What these latest developments show is that the legal system is now being used to challenge State behaviour some 40 years after the events. However, at the time there was a clear lack of legislative guidance in relation to covert operations and both the domestic and international courts failed to constrain the activities of the British government in dealing with informants. The next chapter will examine the contingency plans developed to deal with the conflict in Northern Ireland should the violence in the Province get worse.

[847] *Keeley v Chief Constable Police Service Northern Ireland* (PSNI) and others [2011] NIQB 38.
[848] Cowan (n740).
[849] *McGartland and another v Attorney General* [2014] EWCH 2248 (QB).

## Chapter 6: Contingency Planning during The Troubles: The Tuzo Plan and Operation Folklore

7.1 In attempting to understand the commitment of the British Army and the MOD to acting within the law it might be helpful to look at the British Army's contingency plans initially developed by Lieutenant General Sir Harry Tuzo. These plans were drawn up, initially by the British Army, but then contributed to by other Whitehall departments, to deal with the emergency in Northern Ireland if the 1972 cease-fire broke down and the violence escalated beyond the levels experienced prior to the cease-fire.

7.2 The contingency plans were revised many times and although originally known as the Tuzo Plan, later these plans were given the codename Operation Folklore. Operation Folklore was never implemented but the contingency plans continued to be revised throughout the early years of the conflict. The plans shed light on how the military understood its role in the conflict, and how well it adjusted to its new role as a police force, as well as revealing the commitment of senior officers and senior civil servants to operating within the law.

7.3 The academic literature seems to describe a State's response to terrorism as either following the 'war' model in which terrorists are treated as the enemy needing to be destroyed. In this model, the conflict is understood to be a small war. The alternative model is the 'criminal justice' model in which terrorists are treated as criminals and the State relies on the criminal justice system to bring terrorists to trial. In this model terrorism is understood to be a large crime.

7.4 It has been suggested that the 'war' model permeated British Army thinking and heavily influenced the rhetoric employed by senior officers during the conflict.[850] The suggestion is that the British Army understood the situation in Northern Ireland in terms of enemies and battle lines and this attitude translated into the use of repressive techniques. In other words, it would appear that 'dealing with

[850] M Smith, Sophie Roberts, 'War in the Gray: Exploring the Concept of a Dirty War' (2008) 31(5) Studies in Conflict & Terrorism 337, 385.

internal civil disorder was not a natural extension of the Army's normal role'.[851] Maintaining law and order and investigating crimes through the collection of evidence required a very different skill-set to those that the average soldier had acquired during training.

## The Tuzo Plan

7.5 British Army thinking and the extent of the influence of the 'war' model can be seen in a letter sent by Lieutenant General Sir Harry Tuzo (GOC NI) to The Rt. Hon. William Whitelaw on the 9 July 1972. Enclosed with the letter was a draft plan, entitled 'Military Operations in the Event of a Renewed IRA campaign of Violence'.[852] The draft plan, which became known as the Tuzo Plan, outlined the British Army's analysis of the options available to it, should the current cease-fire break down and IRA renew their campaign of violence.[853] Two strategies were considered in the draft plan but the option involving the more offensive measures was preferred. Interestingly, the draft plan makes the point on the first page that the proposed new powers were not envisaged to deal with a civil war situation or Doomsday scenario, but just increased levels of violence. This is obviously the case since if the situation descended into civil war the British Army would not require additional legal powers.

7.6 The Tuzo Plan revealed what many in the Roman Catholic community had suspected all along and that was that the British Army did not view the UDA in the same way as it viewed the IRA, despite the UDA being involved in killing Roman Catholics. The Tuzo Plan suggested that it might be necessary to turn a blind-eye to UDA members carrying weapons in areas that they controlled. The Tuzo Plan goes on to suggest that HM Forces should develop a tacit understanding with the UDA that they have a role to play in protecting Protestant areas. In other words, the UDA were to be treated in effect as allies in the conflict.

[851] Adam Roberts, 'Ethics, Terrorism and Counter-Terrorism' (1989) 1(1) Terrorism and Political Violence 48, 60.
[852] 'The Tuzo Plan, 1972: Extirpate The IRA and 'Turn a Blind Eye to UDA Guns'' *The Broken Elbow* (17 June 2015) <https://thebrokenelbow.com/2015/06/17/the-tuzo-plan-1972-extirpate-the-ira-and-turn-a-blind-eye-to-uda-guns/> accessed 17 March 2017. (The Tuzo Plan)
[853] ibid.

The implication is that the laws relating to the possession of weapons were to be ignored when it suited the British Army.

7.7 In addition to these unlawful measures, the draft plan also looked at legal measures that would need to be put in place before the Tuzo Plan could be implemented. These measures involved extending the powers under the Special Powers Act (SPA)[854] and creating new legislation to allow greater freedom of action by the Security Forces.

7.8 The draft plan proposed extending SPA powers in the following ways. It suggested the Regulation 7 be extended to allow soldiers to stop and search people in the street and ask questions but in addition allow soldiers to take people to detention centres for further questioning. HM Forces were to be given the authority to arrest and detain suspects for 5 days rather than 48 hours and given the power to directly authorise a curfew under Regulation 19 if ordered by an officer of the rank of Brigadier Commander or above.[855]

7.9 The draft plan also suggested that the Tribunal dealing with internment appeals should have powers to make internment orders and the power to release those interned rather than recommend release, as under the current legislation. The draft plan refers to increased numbers of Tribunals. This would suggest that the British Army anticipated that the numbers of people interned would be large.

7.10 The draft plan also introduced the idea of Special Courts, where the rules of evidence were amended to allow for more convictions. Again, the draft plan states that there would be a need for more judges and more magistrates, presumably again to cope with increased numbers of people being charged. In the draft plan, it was also proposed that the right to bail from police and court would be curtailed and the restrictions on holding juveniles removed. Another suggestion was to bring those detained for minor offences before the magistrates immediately after arrest.

[854] The Civil Authorities (Special Powers Act) Northern Ireland 1972.
[855] This was presumably the Army's solution to the dilemma facing GOC NI prior to the Falls Road Curfew.

7.11 Importantly, the draft plan also outlined the need for powers of a quite different nature. The draft plan recommended that the concept of minimum or reasonable force would need to be suspended. It was explained that the Yellow Card Rules of Engagement were inappropriate in an offensive operation and suggested soldiers be given the legal right to shoot armed men on sight, to use suppressive force[856] and to use heavy weapons such as a Carl Gustav.[857] The draft plan proposed that an indemnity act should also be enacted providing indemnity for all soldiers acting in good faith in the line of duty.

7.12 It is clear from the draft plan that there has been a paradigm shift in thinking in relation to the role of the British Army. The British Army is no longer understood to be providing support for the police or acting as 'military aid to the civil power'. Under the Tuzo Plan the British Army would be prosecuting an offensive operation. It would appear that the British Army would continue to operate within the normal law during this period of renewed violence, which would explain the need for an indemnity act. What all of this means is that soldiers were to be given the right to shoot armed men in situations where their own lives were not at risk and nor was anyone else's life at risk. They were to be given the right to use heavy weapons, and the right to aim their weapons other than at the target. The soldiers would then be provided with immunity from prosecution - and all this in the United Kingdom in the late twentieth century in a situation short of civil war. This aggressive plan seems to have been devised to 'combat and annihilate the Provisional IRA with maximum force and minimum fuss'.[858]

7.13 The Tuzo Plan was sent to the then Secretary of State for Northern Ireland, William Whitelaw on the 9 July 1972 but there is no evidence of a response from him and so it is not known whether Ministerial approval was given but it seems

[856] Suppressive force means covering fire.
[857] What is being referred to is a Carl Gustav 84 mm anti-tank gun. The conflict in Northern Ireland was fought in both urban areas and in rural areas. It is difficult to imagine this weapon being used in an urban area without causing a large number of casualties.
[858] 'The Tuzo Plan (n852).

unlikely.[859] In February 1971 Harry Tuzo was promoted to General Officer Commanding in Northern Ireland and it seems safe to assume that he devised his plan while he was in that position given the date of the letter sent to the Secretary of State for Northern Ireland. Whether or not that is true, the draft plan assumes a greater significance because of Tuzo's position as GOC NI. The Tuzo Plan supports the theory that the British Army very much retained a military mindset and understood the conflict in terms of a small war rather than a large crime.

7.14 The Tuzo Plan identified various problems that would need to be managed.[860] However, interestingly the list of problems did not include any potential legal issues, suggesting that the need to act within the law was not a top priority. Despite not being identified, the draft plan would have had various potential legal implications, had it ever been implemented. The draft plan would have had implications for constitutional law, for international law and for the continued use of ordinary criminal law.

7.15 Soldiers operating to suppress an insurrection are obliged under the common law to use no more force than is necessary. The Yellow Card reinforced this obligation requiring first and foremost the use of minimum force. The Tuzo Plan includes a provision to suspend the obligation to use minimum force or reasonable force. In law 'reasonable force' means using the least force that the situation

[859] The National Archives (TNA): Public Records Office (PRO) DEFE 25/283 Ministry of Defence DOP 529/72 (Second Edition), 'Arrest, Interrogation and Detention' 26 September 1973. (MOD DOP 529/72)

[860] These problems included the following:
A force level penalty
The difficulty in employing sufficiently selective operations in the initial stages to avoid alienating the Catholic community
Occupation of the Bogside and Creggan will be considered an anti-Catholic as opposed to an anti-IRA act. This must be contained by our own information policy.
The difficulty, in flushing out the IRA – once the initial fire-fight is over and they have gone to ground.
The effect on world opinion of the more aggressive military action. Much will depend on the circumstances in which hostilities are re-opened on the effect of our information policy – the speed with which we reach a successful conclusion.
Even assuming a successful pick up and the infliction of many IRA casualties in the initial phase, some residual bombing and sniping is bound to continue until demoralisation of the IRA is complete.

requires. Suspending the common-law obligation to use minimum force or reasonable force is problematic.

7.16 Suspending the provisions of the Yellow Card would mean that soldiers could open fire without instruction from a commanding officer, fire without warning, fire other than at a target and continue firing rounds when not absolutely necessary. To suspend the operation of the common law would require legislation but legislative provisions have not been included in the draft plan. In addition, these provisions would have resulted in the United Kingdom being in breach of Article 2, the right to life, of the European Convention.[861] The idea of an indemnity act also raises issues in relation to Article 2 and Article 13.[862]

7.17 The draft plan also suggests that the British Army should work with the UDA to protect Protestant communities and this aspect of the draft plan would require the UDA to be allowed to openly carry weapons on the streets. To be a member of the UDA in the 1970s was not against the law but arguably it should have been. This is because the UDA was already understood to be a paramilitary organisation involved in a wide range of criminal activities including murder. Under the Tuzo Plan, the British Army would have had to operate alongside this organisation, allowing them to break the law by openly carrying guns on the street and presumably also allowing their other criminal activities to continue. At the same time the British Army would be enforcing the law against Roman Catholic paramilitaries. Giving the British Army discretion as to who can and who cannot break the law clearly has serious implications for the rule of law. This aspect of the plan lends weight to the idea that the British Army had little commitment to operating within the law, little respect for the rule of law and that it was not even a priority to maintain the appearance of operating within the law.

[861] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 10 April 2018] For a more detailed discussion of this point see later in this chapter at para 7.49-7.55.
[862] These are discussed later in this chapter at para 7.49-7.52.

7.18 In relation to international law, the conflict was generally understood to fall short of a non-international armed conflict and therefore the conflict was outside the reach of international humanitarian law. However, if the intensity of the violence increased then that understanding of the conflict could potentially have come under pressure. In other words, the very fact that the British Army would be prosecuting an offensive operation might be used to re-categorise the conflict as a non-international armed conflict. Article 3 common to the four 1949 Geneva Conventions[863] and the two 1977 Protocols[864] require certain criteria to be met for there to be a non-international armed conflict.[865]

7.19 At the time the Tuzo Plan was being drawn up it was understood that the level of violence that would trigger Article 3 protection is measured against firstly, the sustained and concerted nature of violence, secondly, the degree of organisation of the terrorist group and thirdly, the control of territory. The following indicators are used to gauge the level of intensity of the violence: the duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used, the number of casualties and the

[863] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 29 December 2017]
International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 29 December 2017]
International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005, available at: http://www.refworld.org/docid/43de21774.html [accessed 29 December 2017]
International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: http://www.refworld.org/docid/3ae6b36d2.html [accessed 29 December 2017]
[864] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 29 December 2017]
International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 29 December 2017]. The two 1977 Additional Protocols had not been ratified by the United Kingdom at this point and so were not relevant to the conflict in Northern Ireland.
[865] See the introduction at para 1.57-1.66 for more details.

extent of the damage caused by the fighting. The Tuzo Plan, which involved large numbers of soldiers, using heavy weapons and contemplating heavy casualties may have certainly raised questions about the nature of the conflict. However, the Tuzo Plan was never implemented and in fact went through various revisions and emerged as Operation Folklore. Operation Folklore was a much more restrained and less ambitious plan.[866]

## Operation Folklore

7.20 Andrew Sanders states that 'little has been written about Folklore'[867] even though its existence has been known about since 2004 when government documents relating to the operation were declassified. Operation Folklore, in terms of the legality of the planned operation, has received even less attention.

7.21 The most violent year of the conflict was 1972. By the end of that year there had been '10,000 shooting incidents and almost 2000 bombings, leaving an enormous list of casualties: nearly 500 dead and 5000 injured'.[868] The 472 people killed represents 14% of all those killed in the thirty-year conflict.[869] The violence in the Province had escalated considerably since August 1969 when the British Army had been deployed. At the time the British government feared that this deterioration in the conflict might continue and therefore officials in Whitehall began developing the existing contingency plans to cope with the increased levels of violence and devised Operation Folklore. Operation Folklore was a plan to prevent the outbreak of civil war. Sanders claims that 'had it been implemented then it would have changed the entire context of the security operation'.[870]

7.22 The contingency planning involved various government departments including the MOD, the Home Office, the FCO, The Northern Ireland Office and the

[866] The National Archive (TNA): Public Records Office (PRO), CAB 164/110 Northern Ireland Contingency Planning 'Operation Folklore' 1972 Folio 16.
[867] Andrew Sanders, 'Operation Motorman (1972) and the search for a coherent British counterinsurgency strategy in Northern Ireland' (2013) 24(3) Small Wars and Insurgencies 465, 474.
[868] ibid 473.
[869] Bill Rolston, *Unfinished Business: State Killings and the Quest for the Truth* (Beyond the Pale Publishing 2000) reproduced in CAIN at <http://cain.ulst.ac.uk/issue/violence/docs/rolston00.html> accessed on 17 March 2017
[870] Sanders (n867) 468.

Cabinet Office. However, like the Tuzo Plan before it, there is no evidence that Operation Folklore received ministerial approval and so cannot be considered government policy. Nevertheless, the files relating to Operation Folklore offer an insight into what civil servants were willing to contemplate in order to suppress the violence in Northern Ireland and further insight into the mindset of senior British Army officers.

7.23 In the event of the violence spiraling out of control then the British response would be the introduction of a state of emergency coupled with 'overwhelming' military force.[871] At the time that Operation Folklore was being drawn up the Security Force presence in Northern Ireland was at least 24,000 men (at least 10,000 British Army personnel and a further 14,000 RUC and UDR) but at times this figure was higher. However, Operation Folklore planned to 'saturate all the main areas of conflict throughout the Province' [872] with men and military hardware in a two-phase strategy.

7.24 The first phase was Operation Folklore and the second was Operation Raftsman. Sanders suggests that there would have been 'approximately 40,000 troops, an increase of 22 battalions, in its initial urban phase before a further 7 battalions would be deployed to consolidate rural areas'. [873] Operation Folklore also provided for:

> Nine Royal Armored Corps squadrons, a further nine field squadrons, and four aviation squadrons as well as putting a further 20 units on short notice for deployment (…) this would make it the largest British operation since World War II.[874]

On the assumption that a battalion has 1,000 men and a squadron has 250 men, this would have brought the number of soldiers in Northern Ireland to over 50,000. In a very approximate calculation this would have meant that one in every thirty of the population would have been a British soldier.

[871] The National Archive (TNA): Public Record Office (PRO), DEFE 25/282 Northern Ireland: Contingency Planning-Operation Folklore, Speaking Note. (TNA (PRO) DEFE 25/282)
[872] ibid.
[873] Andrew Sanders, Ian Wood *Times of Troubles: Britain's war in Northern Ireland* (Edinburgh University Press 2012) 63.
[874] Sanders (n867) 478.

7.25 The levels of violence envisaged however would not amount to a state of civil war. This can be assumed because if the level of violence amounted to a state of civil war then the Security Forces, presumably heavily reinforced in the case of the British Army, would employ extreme force to suppress the violence. In a civil war situation, there would be no requirement to consider whether or not there was adequate legal powers to cover each and every measure that had to be taken; instead the Army would rely of the common law right to deal with insurrection by meeting force with force.

7.26 Instead the draft plans describe the situation in which these contingency plans might be implemented as a 'great emergency' or a 'grave emergency'.[875] This terminology conveys the idea that the situation envisaged is a crisis but the terms are not legal terms found in domestic or international law. Clearly the situation envisaged was one where stronger measures, (more legal powers and/or more powerful weapons and/or more men) would be needed to prevent control of the situation passing into the hands of the IRA.

7.27 The draft plans state that a 'great' or 'grave' emergency would trigger Operation Folklore and this 'great' or 'grave' emergency would have three features. First, any breakdown in the ceasefire would have been shown to be irreparable. Second, the IRA campaign of terrorism would have developed into an armed insurrection clearly beyond control under the present policy or with the force levels presently available. Third, there would be increasing inter-sectarian violence with considerable UDA involvement. What is clear is that the situation would need to be much worse that it was in 1972, commonly understood to be the worst year of the conflict for the plans to become a reality.

7.28 Operation Folklore gave overall command of the Province to the GOC NI. The level of violence that would trigger Operation Folklore was not defined and instead the decision would be at the discretion of the GOC NI as Director of

[875] TNA (PRO) DEFE 25/282 (n857)

Operations.[876] This would sit comfortably with the constitutional role of the military but unless done after consultation with the government it would raise questions about the assumptions made in a democratic State about the supremacy of parliament.

7.29 Operation Folklore consisted of military measures that could be taken to re-establish control and civil measures that would be needed to support the military

## The Military Measures

7.30 The contingency plans made the basic assumption that the British government's aim remained the restoration of a stable society in Northern Ireland, which would remain part of the United Kingdom. The intervention would be directed at both communities and aimed at removing arms and explosives by means of massive reinforcement of troops, accompanied by searches and interrogation and probably internment. It would aim to put an end to inter-sectarian violence and to administer a shock in the hope of forcing both factions to realise the necessity of an agreed political solution. What was not being contemplated in Operation Folklore was a 'direct military assault upon extremist-dominated Roman Catholic areas of the Province with the aim of securing total military victory over the Irish Republican Army (IRA)'.[877] The reason given was that such a strategy would completely alienate the Roman Catholic community from the British government and destroy any remaining prospect of re-establishing a stable society within the United Kingdom for many years. [878]

7.31 Throughout the development of Operation Folklore various ideas were considered. One of those was the establishment of both a 'prohibitive fire' and 'free fire' zones in Northern Ireland. In the released government files neither of these terms are defined.

7.32 However, General Robert Gard talking about free fire-zones in Vietnam explained that:

[876] MOD DOP 529/72 (n845).
[877] TNA (PRO) DEFE 25/282 (n857).
[878] ibid.

> The words themselves imply that you could shoot anything that moved in the area. I would certainly concede that the term itself is unfortunate and should never have been used. …'Free Fire Zone' really meant only that the military was excused from obtaining clearance from the political authority; all other rules of engagement applied.[879]

7.33 It is not clear what the term free fire-zone would mean in the context of Northern Ireland. One possible interpretation of the term is that tactics on the ground in certain designated areas would be the responsibility of the British Army, but this simply reiterates the existing position under the constitution. Politicians in Westminster would be removed from the decision-making process and only informed after the fact. Maybe the British Army felt this needed to be spelled out because it feared interference from Ministers. The meaning of the term 'prohibitive fire-zone' requires further research but one possible meaning of the term is that it refers to designated areas in which the British Army would require prior authority from their political masters before entering.

7.34 Operation Folklore envisaged a complete closure of the border with the Republic and a total ban on marches, public meetings demonstrations and strikes. It also included a provision for the removal of existing restrictions relating to detaining young persons on remand. This provision was included, presumably, in order to deal with the continuous low-level sectarian street disorder, which involved many young people, rather than to help with deal with the terrorist activities of the IRA.

7.35 The plans for Operation Folklore make it clear that the plan was militarily possible but that ministers would have to accept a number of serious implications and the gravity of those implications were to some extent unknown and unknowable before the Operation was implemented. In the documentation relating to Operation Folklore it states that the serious implications would fall broadly into the following categories:

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[879] James Terry, 'The Vietnam War in Perspective: Lessons Learned in the Law of War applied to Subsequent Conflicts' (2007) 54 Naval Law Review 79, 94.

- disruption of the life of Northern Ireland;
- physical destruction of life and property;
- further alienation of both communities from each other and from the British Government;
- legislation, some of it controversial in character likely to require a significant allotment of Parliamentary time and possibly the recall of Parliament from recess;
- temporary redeployment of a portion of the British Army on the Rhine and temporary inability to meet other military contingencies;
- political and public reaction from some quarters in Great Britain to a policy of harsher measures or to a political solution involving cession of territory from the United Kingdom;
- international opinion, with particular reference to the Irish Republic, the United States, our other NATO allies, and the United Nations.[880]

7.36 At least during the planning stages of Operation Folklore, the legal implications of the plans were recognised unlike in the earlier Tuzo Plan. However, the Tuzo Plan and Operation Folklore do have a lot in common.

## The Civil Measures

7.37 The civil measures involve granting the military greater powers under both the Special Powers (Northern Ireland) Act [881] and under the emergency legislation.[882] The powers contemplated included internment, and if internment was not politically feasible then the 'creation of courts with special procedure rules for the protection of witnesses against identification and hence intimidation, and with special rules of evidence to ensure admissibility of statements obtained in the course of interrogation'.[883]

7.38 The civil measures relating to the Special Powers (Northern Ireland) Act (SPA) included the power to transfer convicted prisoners from Northern Ireland to

[880] TNA (PRO) DEFE 25/282 (n857).
[881] The Civil Authority (Special Powers) Act (Northern Ireland) 1922.
[882] The Emergency Powers Act 1964.
[883] TNA (PRO) DEFE 25/282 (n857).

prisons in Britain, amendments to Regulation 7 (the power for the military to stop and search),[884] amendments to Regulation 10 (authority to authorise detention without a warrant),[885] and amendments to Regulation 19 (the authority to order a curfew).[886]

7.39 Operation Folklore was designed to allow the 'execution of operations necessary to counter action, whether covert or overt, aimed at subverting the security of the state (…) the action necessary for the protection of life and property in case of actual or apprehended civil commotion'.[887] It envisaged the military being given even wider powers than they already had under the existing emergency legislation. These sweeping new powers would include the powers to stop and question civilians,[888] search premises for munitions,[889] search premises for persons,[890] search premises for articles or documents,[891] arrest,[892] detain,[893] and

[884] The Civil Authority (Special Powers) Act (Northern Ireland) 1922.
Regulation 7 empowers members of the armed forces to stop people and require them to answer reasonable questions addressed to them in the place where they are stopped. The amended version of regulation 7 would allow members of the armed forces to tale people elsewhere to be questioned without having to formally arrest them first.
[885] Regulation 10 empowers a RUC officer of rank Superintendent or above to authorise arrest without warrant and detention for not more than 48 hours for the purpose of interrogation. An amendment of Regulation 10 would need to allow members of the armed forces the same powers to arrest without warrant and detain suspects. The period of 48 hours should be extended to five days.
[886] Under Regulation 19 the Civil Authority has the authority to order a curfew but in Operation Folklore floated the desirability of extending the power to military commanders of the rank of Brigadier or above.
[887] The National Archive (TNA): Public Records Office (PRO) DEFE 25/283 Directive for the General Officer Commanding Northern Ireland, as Director of Operations COS 13/73, 16 March 1973, quoted in Sanders (n867) 475.
[888] The proposal was to extend Clause 16 of the EP Act to require:
a. persons to answer questions on any subject concerning the emergency situation or concerning the commission of an offence.
b. the person being questioned to move to a reasonably near (and more convenient) place.
[889] The proposal was to extend Clause 13 of the EP Act to allow search of dwelling house without suspicion and without authority from a commanding officer.
[890] The proposal was to extend Clause 15 of the EP Act to allow search of dwelling houses without authority from a commanding officer.
[891] The proposal was to '[p]rovide power to allow any member of Her Majesty's forces on duty or any RUC Constable or officer to enter and search premises or other places including dwelling-houses, in which it is suspected that there are articles or documents connected with terrorism or with the commission of an offence, and to seize the said objects.
[892] The proposal was to extend Clause 12 of the EP Act as follows:
as to grounds: suspicion of having information about past, present or future offences.
as to time: extend time limit of soldiers' arrest power to 12 hours. And allow re-arrest under Clause 11 and 12 by a commissioned officer (as well as by a constable) for 12 hours (as opposed to 72 hours under Clause 10).

also the power of entry and interference with right of property.[894] In addition, it was proposed to extend the admissibility of written statements[895] and shift the onus of proof on to the accused for possession of prescribed articles in open places as well as in premises. There is a tendency for emergency legislation to empower the lower echelons of the security forces with sweeping discretionary powers such as the power to stop and search people and to search houses. The legislation envisaged by the British Army clearly followed this pattern.

7.40 However, what was also contemplated in Operation Folklore was a 'power of a different sort'[896] and this related to situations where soldiers could use lethal force. The kind of power contemplated is essentially the same kind of power proposed in the Tuzo Plan discussed above. The MOD thought it was 'essential for a soldier to be able to open fire without fear of legal penalty in certain circumstances where under the present law a court would consider that he had acted unlawfully'.[897]

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Power for commissioned officer to authorise soldiers to finger-print and photograph, by use of reasonable force if necessary.
Entry of premises for purpose of arrest to be permissible on suspicion only for all offences not only for offences involving terrorism and munitions.

[893] The proposal envisaged alterations to Schedule 1 (Part II) to allow ICOs to be issued against persons suspected of committing any of the scheduled offences: and add larceny to the list of scheduled offences and delete Note 4 (the aim being to catch looters).
Extend max. period before ICO is referred to the commissioners from 28 days to 90 days.

[894] Extend the powers of entry in Clause 17(1) (a) of EP Act by deleting 'in the course of operations'.
Extend the powers of taking possession of and interfering with property in Clause 17(2)(a) to (d) of EP Act by empowering Brigade Commanders (and Deputy Commissioners acting as Commanders) – as opposed to the Secretary of State- to authorise those activities by HM Forces, constables or persons authorised by S of S.

[895] Extend Clause 5 of the EP Act to admit as evidence in all circumstances written statements by members of HM Forces or constables.

[896] Letter from Mr. A.W. Stephens Head of the Defence Secretariat to Mr. V.H.S Benham of the Northern Irish Office dated 16 November 1973 reference D/DS10/44/17/6 <http://www.cain.ulst.ac.uk/publicrecords/1973/fco87_248_special_1.jpg> accessed on 17April 2017.

[897] ibid.

7.41 The following clauses were proposed but it was conceded that this was not a comprehensive list.

a. opening fire without warning on a person merely for carrying firearms (i.e. without having to be satisfied that they were about to use them etc.);
b. opening fire on persons breaking a curfew who failed to halt when challenged; and
c. opening fire in certain other situations, e.g. at persons who failed to halt when challenged, in areas designated by the S of S or, perhaps, the GOC as "special areas", which would, typically, be exceptionally "hard" areas and which might or might not correspond with areas under curfew.[898]

7.42 Firstly, soldiers could use lethal force if they saw someone carrying a weapon even if there was no suspicion that the weapon was about to be fired. Secondly, soldiers could aim and fire at someone who failed to stop when asked to do so during a curfew. In other words, soldiers could open fire when there is no risk to life or property but the target was breaking a curfew order and failed to stop. Thirdly, soldiers could take aim and fire if a person who failed to stop when asked to do so and the area was a designated 'special area'. The Operation plans explain that 'special areas' would be exceptionally 'hard' areas. The term 'hard' area is not defined but presumably these 'hard' areas would be Roman Catholic areas where support for the IRA was strong. The legal implications of these kinds of clauses have already been discussed in relation to the Tuzo Plan earlier in this chapter.

7.43 Operation Folklore was never implemented but it shows just how aggressive British Army thinking was at the time, how seriously the threat from the IRA was taken, and reveals a willingness to contemplate heavy civilian casualties in both the British Army and Whitehall. Hamill quotes a conversation between Major-General Ford and the Prime Minister Edward Heath in 1972 that suggests that heavy civilian casualties were also willing to be contemplated at the highest levels

[898] TNA (PRO) DEFE 25/282 (n857).

of government.[899] Major–General Ford briefed Edward Heath, Harry Tuzo and Sir Michael Carver on the details of Operation Motorman. Operation Motorman was the Operation that was implemented in place of Operation Folklore in July and August of 1972. Operation Motorman was a much less aggressive plan that aimed simply to get rid of the 'no-go' areas 'and establish a continuing presence in all hard areas'.[900]

7.44 The Prime Minister, Edward Heath, asked about the number of casualties the British Army anticipated if Operation Motorman was implemented. Edward Heath asked if it would be as many as a thousand casualties. Major–General Ford replied that he thought the number of casualties would be no more than a hundred. This he speculated could potentially include ten dead with ninety injured.[901] Edward Heath responded saying 'I think up to 100 casualties is politically acceptable'.[902] The conversation reveals that the Prime Minister was clearly willing to contemplate heavy civilian casualties even after Bloody Sunday. It also suggests the Operation Folklore, a much more aggressive plan, would have involved for more than a hundred civilian casualties although no estimates are given in the Operation plans.

7.45 Operation Folklore may not have been implemented because the number of casualties and scale of devastation was politically unacceptable, or because the levels of violence never reached the threshold to warrant its implementation. Another explanation is that there was a change in British strategy. Operation Folklore is arguably underpinned by the belief that defeating PIRA is a pre-condition to beginning peace talks but after direct rule was imposed the British came to understand that 'political and military aims were (…) crucially interdependent'.[903] For this reason, it has been suggested that Operation

[899] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 115.
[900] ibid.
[901] ibid.
[902] ibid.
[903] Huw Bennett, 'Smoke Without Fire? Allegations Against the British Army in Northern Ireland, 1972-5' (2013) 24(2) Twentieth Century History 275, 278.

Motorman [that was implemented in 1972] represented the subordination of the military desire to destroy PIRA to the political need for negotiation.[904]

7.46 Operation Folklore clearly envisaged that the British Army would continue to operate under the ordinary criminal law but that a 'blanket immunity' from prosecution would be granted to soldiers. Operation Folklore proposed to widen the emergency powers to allow the British Army a much freer reign. On the one hand this could be understood as just that. The plans for Operation Folklore merely extended existing powers. On the other hand, it could be argued that the extensions contemplated changed the very nature of the powers involved. Even if this was not necessarily the case when looking at individual powers, when taken collectively, the widening of these powers to the extent that was contemplated, in conjunction with the sheer numbers of soldiers involved in the Operation, changed the nature of those powers. With the huge numbers involved in the Operation, and the focus of the Operation on Roman Catholic areas, it seems likely that every Roman Catholic family would have been affected.

7.47 It is also clear that the military equated having more powers, with ability to deal more effectively with the conflict. In other words, there was an assumption underpinning military thinking at the time, that loosening restrictions on the Security Forces would translate into anti-terrorist benefits. There was no recognition that giving sweeping powers to the British Army might produce a 'backlash'.[905] So there was no thought given to the idea that more repressive legislation operating in an ambiguous or legally undetermined way might provide the IRA with an opportunity to mobilise more support for its cause.

7.48 Extending the emergency powers in this way raises some obvious legal issues at a domestic level and also at an international level. In terms of international law, like the Tuzo Plan before it, Operation Folklore might have been used to re-categorise the conflict as an international humanitarian conflict and as such, engage international humanitarian law. If there had been no re-categorisation of the

[904] ibid.
[905] Andrew Mumford, 'Minimum Force meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns' (2012) 11(1) Journal of Military Ethics 10, 15.

conflict then the relevant international legal framework would have remained the European Convention.[906]

## Contingency Planning and ECHR Obligations

7.49 Article 2[907] of the European Convention requires the British government to take steps to safeguard the lives of everyone in the United Kingdom. The State is expressly forbidden to take life. Article 2 is one of the four exceptions from the power to derogate in Article 15 of the European Convention. However, there is no breach of Article 2 if death results from the use of force that is no more than absolutely necessary:

- In self-defence or the defence of another from unlawful violence
- To lawfully arrest someone or prevent them escaping lawful detention
- To take action lawfully to quell a riot or insurrection.

7.50 The key test is that the force used must absolutely or 'strictly necessary'.[908] In other words, the force used must be essential and proportionate to address the problem concerned and no other action, short of using lethal force, could have achieved that purpose.

7.51 The powers suggested in Operation Folklore in relation to the use of lethal force in situations where no life is threatened, no-one is being arrested or trying to escape lawful custody, and the force is not used to quell a riot or insurrection would certainly have put the United Kingdom in breach of its treaty obligations.

7.52 Article 2 also requires that there is an official investigation into all deaths arising out of the States use of force and that the investigation is 'independent, prompt and transparent.'[909] The duty to investigate a death under Article 2 is closely

[906] European Convention (n863).
[907] ibid.
[908] *McCann v United Kingdom* (1995) 21 EHRR97.
[909] *Jordon and others v United Kingdom* (2003) 37 EHRR 2.

linked to Article 13 and the right to an effective remedy. An investigation into a suspicious death must be designed to lead to criminal proceedings.[910] All these cases came before the Court after 1972 when Operation Folklore was being planned. However, the blanket provision of immunity from prosecution as contemplated in Operation Folklore would still have been problematic because of the link between Article 2 and Article 13.

7.53 In recently declassified files, the Tactical Doctrine Working Party Study of Counter-Revolutionary Operations post 1975 reveals that the MOD was aware that the powers proposed under Operation Folklore 'could conflict to a greater or lesser extent with the European Convention on Human Rights'.[911] However, the study concludes that 'these powers are so essential for military efficiency, that they are recommended notwithstanding the terms of the Convention'.[912] There is a suggestion that the powers be used in a 'reasonable way and in such a manner as to minimise potential conflict with the Convention'[913] but it is clear that the Tactical Doctrine Working Party Study did not recommend that Britain's legal obligations under the European Convention could be allowed to take priority over military efficiency.

7.54 Both the Tuzo Plan and Operation Folklore do not appear to have been shown to any government lawyers before being presented to ministers. This oversight may of course have been rectified had the plans ever been implemented, but the fact that legal advice was not sought as the plans were being developed, suggests that the legality of the plans was not a priority to those senior British Army officers and Whitehall officials involved in their development.

7.55 Operation Folklore was never implemented but is interesting because it provides an insight into what civil servants and senior military officers were willing to contemplate in relation to domestic and international law. The next chapter will

[910] *Akkoc v Turkey* (2002) 34 EHRR 51.
[911] The National Archive (TNA) Public Records Office: DEFE 24/2836 Northern Ireland General Legal Matters Operation Folklore Tactical Doctrine Working Party Study of Counter - Revolutionary Operations post 1975 Folio E11.
[912] ibid.
[913] ibid.

look at policies that were implemented, specifically Operation Demetrius and the use of the five sensory deprivation techniques.

## Chapter 7: Internment and the use of in-depth interrogation[914] and how the British dealt with allegations of abuse relating to these two policies

8.1 In trying to assess whether successive British governments were committed to operating within the law this chapter will focus on the policy of internment and the introduction of what was termed 'interrogations in-depth'. It will then look at how allegations of abuse in relation to these two policies were dealt with by the British government.

8.2 Internment and in-depth interrogation are arguably the most contentious policies introduced during the recent Troubles. The idea is that if the British government's commitment to operating within the law was less than it might have been in relation to these two policies, despite the inevitable public and media scrutiny they would attract, then the implications is that commitment to the rule of law would be even more lacking for less controversial policies. In other words, commitment to operating within the law in relation to the introduction of the most contentious policies is being used as a bell-weather to make assumptions about the British government's commitment to operating within the law in relation to less controversial policies.

8.3 There are two competing theories that attempt to explain the impact on the conflict of increasing the legal powers of the Security Forces. The first theory and the prevailing theory at the time, is that increased legal powers translated into anti-terrorist benefits. In other words, additional legal powers are understood to act as a 'force multiplier'. That is the increased legal powers represent a capability, which when employed by the Security Forces, would significantly increase the potential of the Security Forces and the probability of success in military terms.[915]

[914] In-depth interrogation is generally used to mean interrogations where the five sensory deprivation techniques were used.
[915] Common force multipliers include technology, weather, morale, communications and intelligence. The size increase in manpower that would be required to give an equivalent advantage to the Security Forces, as the advantage provided by the increased legal powers, is the multiplication factor.

8.4 The alternative theory is that the introduction of further legal powers, which tend to be repressive in nature, will generate both a sense of grievance in the 'other' community and it will increase the risk of creating genuine grievances. Grievances, whether genuine or perceived, undermine the States claim to legitimacy. This in turn presents terrorist organisations with opportunities to mobilise support. Increased support leads to increased levels of violence. This sequence of events is sometimes referred to as the 'backlash'.[916] Repressive legal powers create a violent backlash that leads to even more repressive legal powers, and so the downward cycle continues.

8.5 On this understanding, the law is not standing outside the conflict, merely providing a set of rules that govern the fight. Instead, the law represents a dimension of the conflict. During the Troubles the introduction of new legislation potentially impacted the outcome of the conflict by providing another platform on which the two sides could do battle. This is in addition to the battlegrounds that individual cases provided. Whether or not the new legislation did affect the course of the conflict or, indeed the outcome, will be looked at in relation to the two policies of internment and in-depth interrogations.

## The Introduction of Internment

8.6 Powers contained in the Civil Authorities (Special Powers) Act (SPA) included the power to re-introduce internment[917] and conferred extraordinary powers of arrest[918] and detention.[919] Internment had been introduced in the province on three previous occasions in 1921-1924, 1938-1945 and 1956-1961. It was re-introduced

[916] Joao Ricardo Faria, Daniel Arce, 'Counterterrorism and Its Impact on Terrorism Support and Recruitment: Accounting for Backlash' (2012) 23(5) Defence and Peace Economics 431.
[917] Civil Authorities (Special Powers) Acts 1922-1943 (Northern Ireland) Regulations 12 (S.R.&O. (N.I.) No. 191 1956)
[918] Civil Authorities (Special Powers) Acts 1922-1943 (Northern Ireland) Regulations 10 (S.R.&O. (N.I.) No. 132 1957) regulation 11 (S.R. & O. (N.I.) No.191, 156) regulation 12 (S.R.&O. (N.I.) No. 191 1956). The Act also gave a power of arrest to any member of H.M. Forces on duty and police constables in respect of any crime under the regulations.
[919] Civil Authorities (Special Powers) Acts 1922-1943 (Northern Ireland) Regulations 10 (S.R.&O. (N.I.) No. 132 1957) regulation 11 (S.R. & O. (N.I.) No.191, 156).

on the 9 August 1971[920] by Mr. Brian Faulkner, who was at the time both the Prime Minister and Home Affairs Minister of the Northern Ireland government. The move to re-introduce internment was made with the consent of Westminster[921] and Edward Heath, the British Prime Minister at the time, had approved the introduction of internment on the 4 August 1971.[922]

8.7 Andrew Mumford claims that Edward Heath, put the proposal for internment before the full Cabinet on the 3 of August 1971.[923] Heath argued that although internment contravened the European Convention on Human Rights this was not a reason to put plans to introduce internment on hold. Instead, he argued that because Britain was not a full member of the European Community, the United Kingdom was not duty-bound by the European Convention.[924] Heath's argument was that the situation in Northern Ireland 'was now too grave for us to be swayed by such considerations'[925] 'considerations such as human rights, civil liberties and habeas corpus'.[926]

8.8 It is true that in August 1971 the United Kingdom was not a member of the European Economic Community (EEC).[927] However, it is not clear why non-membership of the EEC would negate British obligations under the European Convention adopted in 1950 by the Council of Europe and ratified in 1951 by the United Kingdom.[928] The Heath Cabinet in 1971 consisted of 20 Cabinet

[920] Operation Demetrius was due to be implemented on the 10th August 1971 but was brought forward by 24hours in order to retain an element of surprise.
[921] '[A] decision for internment is a decision taken by the Northern Ireland Government after consultation with the Government of the United Kingdom.' Mr. Balniel, Minister of State for Defence, H.C. Deb. Vol. 823, Col. 212 (September 23, 1971).
[922] On condition that Faulkner banned parades in Northern Ireland for six months.
[923] Andrew Mumford, 'Minimum Force meets Brutality: Detention, Interrogation and Torture in British Counter-Insurgency Campaigns' (20120 11(1) Journal of Military Ethics 10, 15.
[924] ibid.
[925] Edward Heath, *The Course of My Life* (Hodder and Stoughton 1998) 428.
[926] Mumford (n923) 15.
[927] In 1967 Britain applied to join the European Economic Community. Negotiations started in 1970 and the UK eventually signed on 22 January 1972 and our membership came into effect on 1 January 1973.
[928] The Council of Europe was founded by the Statute of the Council of Europe sometimes referred to as the Treaty of London 1949. (Statute of the Council of Europe, 87 UNTS 103 ETS 1). It was signed by the ten original member States. In addition, the United Kingdom had moral, though not legal, obligations under the Universal Declaration of Human Rights adopted in 1948. UN General

Ministers of which seven were lawyers.[929] It is therefore difficult to believe that this line of argument went unchallenged. The argument, at best, can be described as the British government side-stepping its obligations on what it believed was a technicality and at worst it represents a total disregard for convention obligations. Either way it undermines any claim made by the British government to being committed to operating within the law.

8.9 In the House of Commons debates that took place on the 22 September 1971 the Home Secretary, Reginald Maudling, justified internment on the basis that it was necessary in order to contain the violence. He stated that:

> The object of the internment policy is to hold in safety, where they can do no further harm, active members of the IRA and secondly, to obtain more information about their activities, their conspiracy and their organisation, to help the Security Forces in their job of protecting the public as a whole against their activities.[930]

8.10 However, the pressure to introduce internment came from the Northern Irish Prime Minister, Brian Faulkner. The number of bombings in Northern Ireland was rising significantly. In April 1971 37 bombs exploded in Northern Ireland and that figure steadily rose to 94 bomb attacks in July 1971.[931] In total there were 304 explosions in the first 7 months of 1971[932] and shootings at the Security Forces was on the rise. By 9 August 1971, 13 soldiers, 2 policemen and 16 civilians had died since the beginning of the year.[933] In addition, serious and prolonged rioting occurred in both Roman Catholic and Protestant areas.[934]

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Assembly, Universal Declaration of Human Rights 10 December 1948, 217A(III), available at http://www.refworld.org/docid/3ae6b3712c.html accessed 12 October 2017.

[929] The Rt.Hon. Lord Hailsham of St. Marylebone, The Rt. Hon. Anthony Barber, The Rt. Hon Sir Keith Joseph, The Rt. Hon. Geoffrey Rippon, The Rt. Hon. Margaret Thatcher, The Rt. Hon. Peter Thomas and the Rt. Hon. Sir Geoffrey Howe.

[930] Mumford (n923) 16.

[931] *Ireland v United Kingdom* (1978) 2 EHRR 25 para 32. [*Ireland v United Kingdom*]

[932] ibid.

[933] ibid.

[934] ibid.

8.11 According to Richard Clutterbuck, Brian Faulkner argued that if internment was not introduced 'there was a serious risk of the Protestant population taking the law into their own hands'.[935] In its judgment in *Ireland v UK* the European Court of Human Rights noted that there had been mounting pressure for its introduction and that 'there had been demonstrations against the then Prime Minister because of his government's failure to deal with the IRA threat'.[936] Within the Northern Ireland Parliament there was also intense pressure on Brian Faulkner from Ian Paisley to introduce internment[937] and eventually 'Faulkner and Westminster - succumbed to extreme Unionist pressure'.[938] The British Army operational instructions for Operation Demetrius[939] refer explicitly to the operation as 'reassurance for the majority community'.[940]

8.12 After the Cabinet meeting on the 3 August 1971 in which Edward Heath sought approval for the introduction of internment[941] there was another meeting in Downing Street a day later at which Brain Faulkner was present.[942] Heath voiced 'doubts about whether internment could be militarily effective in the long run',[943] reiterating the opinion of the Official Committee on Northern Ireland given on 15 March 1971 that internment would not help the military position.[944]

8.13 Nor was the British Army supportive of the policy to introduce internment. The GOC NI, General Sir Harry Tuzo 'did not recommend internment on military grounds: he considered it militarily unnecessary'.[945] At the meeting Tuzo said

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[935] Richard Clutterbuck, *Guerillas and Terrorists* (Ohio University Press 1980) 48
[936] *Ireland v United Kingdom* (n931) para 35.
[937] Desmond Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (Methuen 1985) 56.
[938] ibid 58.
[939] Operation Demetrius was the codename for the policy of internment.
[940] The National Archive (TNA): Public Records Office (PRO) WO 296/71 Army operational instructions 3/71.
[941] Aaron Edwards, 'A Whipping Boy if Ever There Was One?' The British Army and Politics of Civil-Military Relations in Northern Ireland 1969-79' (2014) 28(2) Contemporary British History 166, 173.
[942] Also present at the meeting were GOC Sir Harry Tuzo, RUC Chief Constable Graham Shillingham, Home Secretary Reginald Maudling, Foreign Secretary Alec Douglas-Home, Defence Secretary Peter Carrington and Chief of General Staff Sir Michael Carver.
[943] Heath (n925) 428-429.
[944] The National Archives (TNA): Public Records Office (PRO) CAB 134/3012.
[945] The National Archives (TNA): Public Records Office (PRO) CJ 4/56.

firmly that 'the disadvantages of internment outweighed the advantages'.[946] Prior to the meeting on the 29 July 1971 Tuzo gave an interview to the *Belfast Telegraph* describing internment as 'a distasteful weapon (…) but it could obviously have an important effect if employed at exactly the right moment in the right framework'.[947] It was not, however, the 'right thing to do at the moment and would create other problems'.[948] At the meeting in Downing Street on the 4 August 1971 Sir Michael Carver, Chief of General Staff, took the view that 'internment should not at present be recommended on military grounds'.[949] Hamill states, that Sir Michael Carver 'did not feel that [internment] was a good idea, and in fact it was the last thing he wanted'.[950] In *Ireland v UK* the Court in its judgment noted that 'as an apparent last resort to avoid introducing internment, Security Forces had intensified operations against suspected terrorists, mounting searches and detaining for questioning what were believed to be key figures in the IRA'.[951]

8.14 The justification of the policy of internment was made on grounds of security[952] but if the Security Forces did not support this policy and did not recommend its implementation at that time, then the implication is that internment was not a security measure but is perhaps better 'interpreted as a political weapon [used]… to outmaneuver a political enemy'.[953] If this is the case then the introduction of this policy and the scale of its implementation may not have been warranted in the circumstances and this may well have implications in relation to whether British obligations under the European Convention were met. It also raises questions at a domestic level about the British government's commitment to the rule of law in

[946] Hamill (n937) 57.
[947] ibid 56.
[948] ibid.
[949] Heath (n925) 428.
[950] Hamill (n937) 5. In order to avoid internment Hamill states that the GOC put forward an alternative plan to make 100 arrests.
[951] *Ireland v United Kingdom* (n931) para 35.
[952] There were three reasons given to justify internment in addition to the explosions and deaths:
1. Normal procedures for investigation and criminal prosecution had become inadequate to deal with PIRA terrorists.
2. The widespread intimidation of the Northern Irish population made the collection of sufficient evidence to secure a conviction impossible. The 'no-go' areas seriously hampered police enquiries.
3.The escape routes into the Republic presented difficulties of control for the authorities. (See *Ireland v UK* (1978) application 5310/71, paragraph 36)
[953] Mumford (n923) 16.

the thick sense of the term. This is because it is difficult to defend the British government's decision to authorise internment in terms of proportionality or reasonableness if it was not necessary on security grounds and the real reason for the introduction of internment was to shore up a Prime Minister and his government.

8.15 The policy of internment, or Operation Demetrius at it was called, operated under three pieces of legislation between August 1971 and March 1975. From August 1971 to November 1972 internment was authorised under the Special Powers Act.[954] Between November 1972 and August 1973 the Detention of Terrorists Orders, in part replaced, and in part supplemented the Special Powers Act. From August 1973 to August 1975 internment was authorised under the Northern Ireland (Emergency Provisions) Act 1973.

8.16 The first swoop took place at 4.30am on the 9 August 1971 and the British Army arrested 342 people and took them to three detention centres across Northern Ireland, Castlereagh, Strand Road and Gough[955] with the exception of a small group of 12 people[956] who had been selected for 'in-depth' interrogation.[957] The arrests were undertaken by parties of soldiers on the basis of an original list provided by the RUC Special Branch.[958]

8.17 The twelve men selected on the 9 August 1971 for in–depth interrogations or intensive interrogations were taken to a secret location now known to be Ballykelly Airfield in Country Londonderry. It was an old RAF airfield until the British Army took control of it in 1971 and renamed it Shackleton Barracks. They

[954] The power to re-introduce internment was provided by the Civil Authorities (Special Powers) Act (Northern Ireland) 1922-43 Regulations (S. R. & O. (N.I.) 1956, No. 191) which was originally enacted in 1921.
[955] Mumford (n923) 16. There were other camps used for internment and these were Magilligan, the Crumlin Road and the temporary internment hold on-board the prison ship Maidstone anchored in Belfast Lough.
[956] Two other men were subjected to in-depth interrogation in October of the same year making a total of fourteen.
[957] Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management and Release* (Oxford University Press, 2001) 211.
[958] Ian Brownlie, 'Interrogation in Depth: The Compton and Parker Reports' (1972) 35(5) Modern Law Review 501; Mumford (n909) 16.

were subjected to in-depth interrogation techniques for between five and six days.[959]

8.18 The in-depth interrogations involved the following five sensory-deprivation techniques: hooding,[960] wall-standing, food-deprivation, sleep-deprivation and the use of 'white noise'.[961] 'White noise has been likened to a train letting-off steam and is produced by an electronic noise generator.'[962] 'The Compton Inquiry was unable to reconcile evidence collected on the type of wall-standing applied in Ballykelly'.[963] Brownlie states that the detainees involved claimed that 'they were forced with batons to retain the posture until they collapsed. They were then put back in position'.[964] 'In contrast supervising staff claimed that although wall-standing was used for up to six hours, no excessive force was used to keep the detainees in the posture.'[965] The Minority Report, Parker Report confirms 'that 'partial records' of the Compton Committee's proceedings show that subject to breaks for bread and water and for toilet visits, some detainees were standing continuously at the wall for periods of up to 16 hours'.[966] The Compton Report also refers to the length of time each detainee spent wall-standing and the times range from between nine hours to 43.5 hours.[967] The detainees were hooded when they were in each other's presence and they were subjected to continuous loud noise.[968] In addition, they were placed on bread and water diets for indefinite periods (one pound of bread and one pint of water every six hours) and deprived of sleep.[969]

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[959] Some of the detainees were held for longer than others.
[960] Samantha Newbury, 'Intelligence and Controversial British Interrogation Techniques: The Northern Ireland Case 1971-2' (2009) 20 Irish Studies in International Affairs 103, 110. The hood was officially referred to as a black pillow slip.
[961] *Report of the committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism* (Cmd 4901, 1971) para 7(b) (The Parker Report); *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August 1971* (Cmnd 4823, 1971) paras 47-52, Chapter VIII (The Compton Report).
[962] Newbury (n960) 111.
[963] ibid.
[964] Brownlie (n958) 502.
[965] Newbury (n960) 111.
[966] The Parker Report (n961) para 7(b).
[967] The Compton Report (n961) para 64
[968] Newbury (n960) 111.
[969] Brownlie (n958) 502.

The Security Forces did advance some justifications for using these techniques in the Compton Inquiry.

> The wall standing was said to minimise the risk of violence towards guards or other detainees. Hooding was said to protect the identities of the detainees from each other. The restricted diet was said to form part of the atmosphere of discipline and the noise was to prevent the detainees hearing or being overheard by each other.[970]

8.19 Lord Balniel, Minister of State for Defence, stated that 'the use of the five techniques of interrogation had been authorised by the Northern Ireland government with the knowledge and concurrence of Her Majesties [sic] Government'.[971] McCleery makes the point that 'the first 12 cases were not cleared individually with Ministers in Whitehall but instead Ministerial authority for the general use of interrogation was obtained in the wider context of the decision to involve internment'.[972]

8.20 The five techniques were outlined in 'The Joint Directive on Military Interrogation in Internal Security Operations Overseas' a report by the Joint Intelligence Committee in 1965.[973] The report stated that a successful interrogation of a prisoner 'calls for a psychological attack'. There are allegations that treatment of detainees in Northern Ireland went much further than permitted under the guidelines. Mumford claims that it is 'widely understood that some internees were forced to run barefoot through 'obstacle courses' that were covered in broken glass, as well as receiving the infamous 'helicopter treatment'.[974] The helicopter treatment involved hooding the detainees and taking them up in a helicopter and then dangling them out over the side in an effort to encourage them to talk. In reality, the helicopter hovered just feet above the ground but the detainees were unaware of this and believed they were in mid-air. The helicopter

[970] The Compton Report (n961) para 13, 15-16.
[971] Martin McCleery, *Operation Demetrius and its Aftermath: A New History of The Use of Internment Without Trial in Northern Ireland 1971-1975* (Manchester University Press 2015) 62.
[972] ibid.
[973] Ministry of Defence, 'Joint Directive on Military Interrogation in Internal Security Operations Overseas JIC (65) 15' (Joint Intelligence Committee 17 February 1965)
[974] Mumford (n923) 18.

treatment was referred to in the Compton Report.[975] It has also been alleged that the British Army administered 'electric shock treatment on a regular basis since November 1971 and had given hallucinogenic drugs to prisoners in order to produce confessions'.[976]

8.21 It is argued by some that internment contributed to the sharp rise in violence in the Province after the 9 August 1971.[977] The statistics would tend to support this conclusion. After internment, there was an immediate rise in the level of violence. Seventeen people were killed in the following 48 hours.[978] Between the 9 and 10 of August 1971 Northern Ireland experienced the worst violence since 1969 and an estimated 7,000 people (mainly Roman Catholics) fled their homes.[979] In the eight months prior to the introduction of internment there were 30 deaths relating to the Troubles. In the eight months following the introduction of internment there were 143 deaths.[980] Other statistics take a longer view. In the first 17 months after internment there were 610 murders compared to 66 in the first two years leading up to internment.[981] In the month prior to the introduction of internment there were 79 explosions.[982] In the months following the introduction of internment the number of explosions increased dramatically. In August to December the number of explosions were 142, 186, 155, 117 and 123.[983] The following year, 1972, was the most violent year of the conflict with '1,382 explosions and 10,628 shootings in Northern Ireland'.[984] Four hundred and seventy-two people were killed, which represents 14% of the total number of people who died in the entire conflict.[985]

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[975] The Compton Report (n961) VIII
[976] John McGuffin, *Internment* (Anvil 1973) 124.
[977] Mumford (n923) 17.
[978] Martin Melaugh, 'Chronology of the Conflict 1971' CAIN web site <http://www.cain.ulst.ac.uk/othelem/chron/ch71.htm> accessed 17 March 2017.
[979] ibid.
[980] Mumford (n923) 17.
[981] Paul Dixon and E O' Keane, *Northern Ireland since 1969* (Harlow Pearson 2011) 102.
[982] R Spjut, 'Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' (1986) 49(6) The Modern Law Review 712, 716.
[983] ibid.
[984] Michael O'Connor, Cilia Rumann, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism in Northern Ireland' (2003) 24(4) Cardozo Law Review 24(4) 1657, 1680.
[985] Bill Rolston, *Unfinished Business: State Killings and the Quest for the Truth* (Beyond the Pale Publishing 2000) reproduced in CAIN at <http://cain.ulster.ac.uk/issues/violence/docs/rolston00.htm> accessed on 17 March 2017.

Most commentators see the increase in violence as being linked to the introduction of the emergency powers.[986] Lord Gardiner in his Report noted that the emergency powers were counterproductive.[987] Brice Dickson, the Chief Commissioner of the Northern Ireland Human Rights Commission (NIHRC) stated in his response to the Government White Paper Legislation against Terrorism 1999 'that internment without trial would serve as effective recruitment propaganda for paramilitary organisations'.[988]

8.22 Much of the unrest is attributed to the fact that those interned came almost exclusively from the Roman Catholic community. In total 3,633 terrorist suspects were arrested during the period of internment, of which only 109 were Protestant Loyalists.[989] It is also claimed that 'the implementation of in-depth interrogation methods became one of the primary obstacles to building an effective 'hearts and minds' strategy across numerous British counter-insurgency campaigns as indigenous populations reacted against tales of torture in detention facilities'.[990] While both policies are linked to a hardening of the minority populations' attitudes to the Security Forces, the two policies have also been linked to a boost in IRA numbers.[991] 'Even Lieutenant General Sir Harry Tuzo, the General Officer Commanding Northern Ireland, admitted that internment had galvanised the IRA.'[992]

[986]This view is not unanimously held. See Laura Donohue, *Counter-terrorist Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press, 2001) 323. Donohue concludes that it is most likely that the emergency powers did lead to a decrease in violence by the mid 1970s.
[987] Report of a Committee to Consider, In the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland (Cmnd 5847, 1975) para 7-8 (The Gardiner Report).
[988] NIHRC response, to the White Paper Legislation Against Terrorism, April 1999 para 7.2 <http://www.nihrc.org/publication/detail/white-paper-legislation-against-terrorism-1999.pdf> accessed 17th March 2017.
[989] David McKitterick, David McKea, *Making Sense of the Troubles* (Penguin 2001) 70
[990] Mumford (n923) 12.
[991] Newbury (n960) 104.
[992] Andrew Sanders, 'Operation Motorman (1972) and the search for a coherent British counterinsurgency strategy in Northern Ireland' (2013) 24(3) Small Wars and Insurgencies 465, 471.

## The British Government Response to the Public Outcry at Internment

8.23 Internment was authorised between August 1971 and March 1975 in Northern Ireland. The use of the five techniques was halted after the initial 14 men[993] who underwent this form of interrogation were released after between five and seven days.[994] None of these 14 men were charged with any offence but the objective of the in-depth interrogations was not to collect evidence in preparation for a criminal trial.[995] The objective was to collect intelligence that could later be used as the basis of further investigations.

8.24 In any case, it has been claimed that confession evidence obtained using in-depth interrogation techniques would have violated the Judges Rules in force at the time.[996] Prior to the introduction of the Police and Criminal Evidence Act 1984 police interrogations were governed by Judges Rules which were directions issued by the Home Office as guidance for police officers interrogating suspects. Incriminating statements made by suspects would only be allowed into evidence if a judge found the confession to have been made voluntarily. Bishop claims that the 'courts in Northern Ireland would not have found an incriminating statement made by a defendant subjected to [in-depth interrogation] to be voluntary'.[997]

8.25 A summary of the intelligence obtained from the initial twelve men that underwent in-depth interrogation was described in the Parker Report. The intelligence included:

- Details of possible IRA operations, arms caches, safe houses, communications, supply routes for arms and explosives, and the location of wanted persons;
- Over 40 sheets of IRA order of Battle and details of approximately 500 IRA personalities; and

[993] Twelve men were subjected to the five techniques initially and then two more men were subjected to the same techniques in the autumn of 1971.
[994] Newbury (n960) 115.
[995] Joseph Bishop, 'Law in the Control of Terrorism and Insurrection: The British Laboratory Experience' (1978) 42(2) Law and Contemporary Problems 140, 162.
[996] ibid 161.
[997] ibid 169.

- Over 40 outstanding major incidents were also cleared from Police records.[998]

8.26 Information from the two men that underwent in-depth interrogation in October produced similar intelligence. Specifically, that information included:

- Identification of over 180 members of both wings of the IRA and their position in the Order of Battle;
- Allocation and description of approximately 80 weapons;
- Details of morale, operational directives, propaganda techniques, relationships with other organisations and future plans; and
- Clearance of a further 45 major incidents outstanding on Police records.[999]

8.27 The documentation providing the summary of the intelligence obtained from the fourteen men does not make it clear whether or not this intelligence was already known to the Security Forces or whether it could have been obtained in another way. 'Stepping over these issues helped the MOD construct its case for the indispensability of the five techniques as aids to gathering intelligence by interrogation in internal security operations.'[1000]

8.28 Within a week, the Irish newspapers spelled out what the five sensory techniques used in in-depth interrogations involved. The response of the British government to the inevitable public outcry to what many understood to be torture and brutality, was to set up an inquiry chaired by the British Ombudsman, Sir Edmund Compton.

8.29 The Compton Inquiry was set up even before the first month of internment had come to an end. The Compton Committee[1001] was established to look into the treatment of the first batch of internees arrested during Operation Demetrius. The

[998] TNA DEFE 13/958 Intelligence gained from Northern Ireland quoted in Newbury (n953) 115. This bullet point is made in the Parker Report and is included under the section about intelligence gathered but it clearly does not strictly relate to intelligence obtained by the implementation of in-depth interrogations.
[999] TNA DEFE 13/958 Intelligence gained from Northern Ireland quoted in Newbury (n953) 116.
[1000] Newbury (n960) 116.
[1001] The Compton Report (n961)

Committee was made up of Sir Edward Compton, His Honour Edgar Fay, Q.C., and Dr. Ronald Gibson.[1002] Its mandate was to investigate allegations of physical brutality by those arrested on the day. The focus of the inquiry concerned the interrogations in-depth. The Committee sat in secret and for those giving evidence legal representation was limited. The lawyers were never allowed to cross-examine witnesses nor have transcripts of the evidence as of right. What is perhaps most surprising is that only one complainant appeared before the Committee.

8.30 The Compton Report was according to Ian Brownlie 'not concerned much with law'.[1003] Instead the Report focused on the concept of physical brutality, a term contained in the inquiry's terms of reference. The Report concluded that physical ill-treatment had taken place but that there had been no brutality. The Report stated that:

> We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened here. [1004]

8.31 The Report was criticised because it failed to look at the cumulative effects of the five techniques if used in combination on one individual, instead choosing to understand the five techniques as mutually exclusive. Another criticism was that the inquiry failed to take into account the psychological side-effects of interrogation, focusing instead on physical effects. According to Andrew Mumford the Commission was therefore able to 'side–step[ing] one of the most long-term and disturbing effects of internment'.[1005] In addition, the Compton Report was also criticised because of the way the definition of the word 'brutality' was manipulated. McGuffin described the refinement of language as 'emasculated semantics'. [1006] The Report appeared to be saying that the ill-treatment of suspects

[1002] Sir Edmund Compton was a civil servant and Dr. Ronald Gibson was a physician.
[1003] Brownlie (n958) 502.
[1004] The Compton Report (n947) para 23
[1005] Mumford (n923) 18.
[1006] John McGuffin, *Internmen*t (Anvil 1973) 116.

did not amount to torture because the British interrogators did not harbor a 'disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain'[1007] – a view that would find little support in any criminal court in the United Kingdom.

8.32 The Compton Report failed to satisfy the critics and a second commission under Lord Parker was established in 1972 to review once again British interrogation methods. This time the Committee was tasked with examining the authorised procedures themselves rather than the application of the authorised procedures. Following the publication of the Compton Report, Edward Heath made a statement referring to the 'five techniques'. The statement attempted to justify the use of the 'five techniques' by focusing on the intelligence gathered and the lives saved as a result.[1008]

8.33 The Parker Committee failed to come to an agreement.[1009] Lord Parker and Mr. Boyd-Carpenter in their Majority Report stressed the necessity of interrogation in volatile situations similar to the one faced by the British in Northern Ireland, and reached the conclusion that the five techniques fell within the guidelines set out in the 1965 directive on interrogation.

8.34 The Joint Directive on Military Interrogation in Internal Security Operations Overseas states:

> Under conditions of emergency, or near emergency, there is likely to be internal security legislation controlling the treatment of detainees and arrested persons. Legislation will vary from country to country and reflect prevailing conditions. Military personnel are to acquaint themselves with the laws of the country concerned, and will not act unlawfully under any circumstances whatever.[1010]

[1007] The Compton Report (n961) para 23
[1008] Newbury (n960) 116.
[1009] All three men on the Parker Committee were lawyers.
[1010] Ministry of Defence, 'Joint Directive on Military Interrogation in Internal Security Operations Overseas JIC (65) 15' (Joint Intelligence Committee 17 February 1965) section 6.

The Directive had been reviewed in 1967 by a senior barrister who had tightened up the procedures to 'ensure careful medical oversight of detainees'.[1011]

8.35 The Majority Report noted that this section of the Directive was not observed[1012] and that the 'application of some of the techniques may amount to criminal assaults'.[1013] In other words, the Parker Committee concluded that the detainees had suffered illegal treatment. However, the Report appeared to be less troubled by this finding than it was about protecting those members of the Security Forces involved in committing those offences. The Report stated 'it would be for the Minister concerned to take advice as to the legal position and if need be to take steps to ensure protection for those taking part in the operation'.[1014] This would presumably be in the form of an indemnity act. The alternative would be to obtain legal insurance in advance and that would leave the degree of ill-treatment without limits. In other words, it would allow the British interrogators to do whatever was necessary to obtain the information required.

8.36 However, the Minority Report of Lord Gardiner disagreed with the Parker Report on the issue of legality. Lord Gardiner stressed the illegal nature of the five techniques. In the final paragraph of the Minority Report he wrote:

> The blame for this sorry story, if blame there be, must lie with those who, many years ago decided that in an emergency conditions in Colonial–type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the tradition of what I believe still to be the greatest democracy in the world.[1015]

8.37 What he also mentioned in his conclusion was that those members of the military giving evidence to the Committee admitted that they had 'never considered whether the procedures were legal or illegal' and in addition there were no

[1011] McCleery (n971) 62.
[1012] The Parker Report (n961) para 38
[1013] ibid.
[1014] ibid para 37.
[1015] ibid para 21.

guidelines as to how the techniques should be implemented. The issue of guidelines was also addressed in the majority Report. Guidelines, it was suggested, would provide safeguards against abuse and ensure that the application of the techniques did not amount to assault in the future. The fact that the legality of using the five techniques had never been considered by the military is quite revealing. Such an admission certainly undermines the credibility of any claim by the British Army that it was determined to operate within the law.

8.38 The MOD and members of the British intelligence community believed that the 'five techniques' represented a very useful tool in the fight against terrorism.[1016] They were keen to ensure that the use of the five techniques continued to be permitted in the future. A meeting chaired by Dunnett in November 1971 was held to discuss how the submissions to the Parker Report ought to be worded.[1017] The issue was how to justify the use of hooding, wall-standing and white sound. The dilemma was whether it was best to admit that these three techniques had a dual purpose in that they served as security measures as well as 'softening up' detainees before interrogation or whether it was better to justify the techniques in terms of security alone. Sir Richard White[1018] argued that the techniques should be justified on security grounds alone because using the techniques to soften up detainees would, he said, 'lay us open to possible charges of physical assault'.[1019] This line of reasoning again undermines the credibility of the claim that the British Army was determined to operate within the law.

8.39 On the day of the publication of the Parker Report, 2 March 1972, Edward Heath announced that the use of the five techniques was to be discontinued. He stated that the techniques 'will not be used in future as an aid to interrogation'.[1020] The British government then issued instructions to the Security Forces prohibiting the

[1016] Newbury (n960) 117.
[1017] ibid. 113.
[1018] Former Director-General of both MI5 and MI6.
[1019] Newbury (n960) 113.
[1020] HC Deb 2 March 1972 vol 832 cols 743-9 Interrogation Techniques (Parker Committee Report) <www.handsard.millbanksystem.com/commons /1972/mar/02/interrogation-techniques-parker> accessed on 17th March 2017.

use of the techniques, whether singly or in combination.[1021] It is worth mentioning again that none of the 14 men were charged with a crime and the men received between £10,000 and £25,000 in out of court settlements.[1022]

## The Use of Public Enquiries

8.40 Facing allegations of what amounted to very serious assaults, the British government's response was not to initiate a criminal investigation but instead the British government's response was to commission a public inquiry closely followed by another. This decision was taken despite the fact that the criminal justice system was perhaps a more obvious vehicle to deal with such serious allegations. It has been argued that the criminal justice system 'is the best legal way to address such violations because the result will be a binding decision and help restore the rule of law that the abuses have undermined'.[1023] The government decision to hold a public inquiry rather than deal with the allegations of abuse in the justice system may itself reveal a lack of determination on the part of the British government to see those members of the Security Forces involved held to account.[1024]

8.41 A public inquiry is a legal mechanism to investigate, examine and report upon issues of grave public concern. Representatives of the State argue that public inquiries expose the facts and 'offers the opportunity to satisfy public concern and ensure accountability'.[1025] There were six public inquiries[1026] set up in Northern

[1021] Elihu Lauterpacht; Greenwood CJ, *International Law Reports* (Cambridge University Press 1980) 241.
[1022] David Bonner, 'Ireland v United Kingdom' (1978) 27(4) The International and Comparative Law Quarterly 897, 901.
[1023] Angela Hegarty, 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland' (2002) 26 Fordham International Law Journal 1148, 1149.
[1024] ibid.
[1025] Tim Suter, 'Public Inquiry: A Very British Institution?' (2011) 161 New Law Journal 1321, 1322.
[1026] Report of the Commission Appointed by the Northern Ireland *Disturbances in Northern Ireland* (Cmd 532, 1969) (The Cameron Report); *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland arising out of events on the 9th August 1971* (Cmnd 4823, 1971) (The Compton Report); *Report of the committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism* (Cmnd 4901, 1972)(The Parker Report); *Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to the loss of life in connection with the*

Ireland to address widespread public disquiet about various matters. Angela Hegarty argues that 'their use has been significantly more limited in Northern Ireland' than elsewhere in the United Kingdom.[1027] However, that may be true if looked at over the 30 years of the Troubles but in terms of the early years of the conflict there were five public inquiries into the behaviour of the Security Forces in the first three years of the conflict. The British government was clearly quite heavily reliant on this mechanism of dealing with public disquiet rather than investigating suspected wrongdoing using the justice system.

8.42 A public inquiry usually examines one particular event or occurrence. It does not result in a binding enforceable decision but instead results in advice or recommendations. The Tribunals of Inquiry (Evidence) Act 1921 provides for an inquiry 'when it appears to the government that a matter of vital public importance requires clarification'.[1028] Tribunals of Inquiry (Evidence) Act 1921 states that a Tribunal of Inquiry 'is for inquiring into a definite matter described (…) as of urgent public importance'.[1029]

8.43 There are two types of public inquiry in the United Kingdom, statutory and non-statutory.[1030] Public inquiries under the 1921 Act must sit in public, but non-statutory tribunals may sit in private if considering sensitive intelligence. Both

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*procession in Londonderry on that day* (HL 101, HC 220, 1972) (The Widgery Report); *Report of Tribunal of Inquiry Violence and Civil Disturbances in Northern Ireland in 1969* (Cmnd 566, 1972) (The Scarman Report); *Report of the Bloody Sunday Inquiry* (HC 30, 2010-11) (The Saville Report). There were other inquiries and reports during the period looking into security practices and policies in Northern Ireland. These included:
*The Report of the Advisory Committee on Police in Northern Ireland* (Cmnd 535, 1969) (The Hunt Report); *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cmnd 5185, 1972) (The Diplock Report); *Report of a Committee to Consider, In the Context of Civil Liberties and Human Rights, Measures to deal with Terrorism In Northern Ireland* 1975, (Cmnd 5847, 1975)(The Gardiner Report); *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Cmnd 7497, 1979) (The Bennett Report).

[1027] Hegarty (n1022) 1157.

[1028] Jack Beatson, 'Should Judges Conduct Public Inquiries?' (2004) 37(2) Israel Law Review 238, 239.

[1029] Tribunals of Inquiry (Evidence) Act 1921 s1.

[1030] At common law, the Crown has the power to set up a public inquiry. The inquiry can be held in private or in public. However, public inquires set up under the Crown's common law powers do not have any rights with respect to compulsion of evidence. Under the Tribunals of Inquiry (Evidence) Act 1921 the inquiry may be set up with powers to compel evidence. This can be done if a motion is passed by both Houses of Parliament.

types have been used in Northern Ireland.[1031] The House of Lords Select Committee stated that 'inquiries are a major feature of our unwritten constitution and play an important part in the way the executive deals with major crises'.[1032] The British government may claim that public inquiries come to the truth and establish accountability but this line of argument is not universally accepted. 'It is claimed that public inquiries are employed by governments not as a tool to find the truth and establish accountability for human rights violations, but as a way of deflecting criticism and avoiding blame.'[1033] In other words, public inquiries are a mechanism of shielding the State from domestic and international criticism.

8.44 One of the issues is that the terms of reference for public inquiries are set by the government of the day and the parameters are normally quite tightly defined. Given their terms of reference neither the Compton Report nor the Parker Report questioned the necessity or legality of the policy of internment when dealing with a state of emergency.

8.45 The obvious example to use to demonstrate the insulating effect of a Public Inquiry would be the Widgery Report on Bloody Sunday. Bloody Sunday was an incident that took place on 30 January 1972 in the Bogside area of Derry in which the British Army shot twenty-six unarmed civilians during a protest march against internment. Fourteen people died, thirteen were killed outright, while the death of another man four months later was attributed to his injuries sustained on that day.

8.46 The Widgery Report supported the British government's version of events, finding no substantive fault on the part of the British Army and no general breakdown in discipline, although Widgery did speculate that at one point, the Army firing 'bordered on the reckless'.[1034] 'The Widgery Report was regarded as unpersuasive by significant sections of the population in Northern Ireland and in

[1031] The Scarman Inquiry and The Widgery Inquiry were set up under the Tribunals of Inquiry (Evidence) Act 1921. The Saville Inquiry is an example of a non-statutory inquiry.
[1032] Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (Report of Session 2013-14) (HL 2014, 143) para 11.
[1033] Hegarty (n1022).
[1034] *Report of the Tribunal appointed to inquire into the events on Sunday 30 January 1972, which led to the loss of life in connection with the procession in Londonderry on that day* (HL 802-11, 1972) para 83-85 (The Widgery Report).

Britain.'[1035] However, Hegarty goes further and argues 'the aim of the Widgery Inquiry was not to find out the truth, nor to provide accountability for the deaths, but to allow the State to validate its behaviour'.[1036]

8.47 The Saville Inquiry,[1037] the second inquiry into Bloody Sunday came to very different conclusions. The Saville Inquiry concluded that:

> The firing by soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious injury. What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and hostility towards the British Army and exacerbated the violent conflict of the years that followed. Bloody Sunday was a tragedy for the bereaved and the wounded, and a catastrophe for the people of Northern Ireland.[1038]

8.48 The fact that the two Reports had such different conclusions would tend to lend weight to Hegarty's argument that the British government relied upon public inquiries to shield itself from criticism. The argument being that in 1972, the date of the first inquiry, the British government needed it confirmed that the soldiers were in the right to open fire. In 2010, the date of the second inquiry, the peace process was underway and the British government's priority was to aid the reconciliation process. By acknowledging past wrongdoing, the British government was arguably encouraging that process. What also seems clear, is that if the function of a public inquiry is to validate the actions of the State, then the British government's dependence on public inquires during the Troubles in Northern Ireland would call into question the British government's commitment to act within the law.

8.49 If the function of a public inquiry is to vindicate State activity then there is risk that the public will perceive a cover-up. Any suspicion of a government whitewash could provide a grievance for the 'other community' that could in turn

[1035] Beatson (n1028) 269.
[1036] Hegarty (n1022) 1148.
[1037] *Report of the Bloody Sunday Inquiry* (HC 30, 2010) (The Saville Report).
[1038] ibid. para 5.5 Principal Conclusions and Overall Account of the Bloody Sunday Inquiry.

mobilise support for terrorist organisations. Increased support for the terrorists could potentially lead to more violence. In other words, a perception of a whitewash can lead to a 'backlash' in the same way repressive legislation can.

8.50 The use or some would say over-use of public inquiries in Northern Ireland during the first phase of the Troubles, arguably side-lined the justice system and ensured that State agents involved in committing crimes were not brought to account. Nevertheless, the British government did take into account at least some of the recommendations made in the reports published by the various public inquiries. 'It is certainly true that public inquiries have had more impact on investigating events or policies, including the policy of internment and the use of the five techniques than the House of Lords.'[1039]

8.51 Internment was introduced during the recent Troubles on 9 August 1971 and discontinued on the 5 December 1975. During that period 1,981 people were detained without charge or trial during this period and of those 1,874 were Roman Catholics and only 107 were Protestants. Internment is 'almost universally recognised … as an utter failure'[1040] and has been described by one commentator as a 'grotesque mistake'.[1041] O'Connor claims that 'Most commentators also recognised internment as a debacle that was totally ineffective at reducing the levels of political violence.' [1042] The policy of internment effectively alienated the Roman Catholic community partly because it targeted Roman Catholics and partly because 'many of those interned had no previous involvement in paramilitary or terrorist activities'.[1043] The brutal treatment of those interned was also 'frequently identified as critical to the decision to join outlawed paramilitary organisations'.[1044] Another consequence of internment and the brutality those interned suffered was that it undermined the justice system as a whole. Lord

[1039] Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57(3) The Modern Law Review 333, 360.
[1040] Committee on the Administration of Justice, No Emergency, No Emergency law; Emergency Legislation- The Case for Repeal (6 March 1995) <http://www.caj.org.uk/contents/567> accessed 17 March 2017.
[1041] John Simpson, *Strange Places, Questionable People* (Pan Macmillan 2009) 98
[1042] O' Connor, Rumann (n984) 1680.
[1043] ibid.
[1044] ibid.

Gardiner commented that internment was 'not considered just by members of the general public' [1045] and that 'delays, the admission of hearsay evidence, the inability to cross-examine witnesses and the lowered standard of proof … [were] not 'British justice'.[1046]

8.52 The introduction of these two policies raises questions about the government's commitment to the rule of law. These questions relate to the reasons that internment was introduced and the fact that they were understood, at the highest levels of government, to put the United Kingdom in breach of its European Convention obligations. The evidence is fragmented and provides just glimpses of the whole picture, but does reveal that Ministers and senior military officers did not prioritise acting within the law in relation to these controversial policies despite being under the media spotlight. In addition, it has been claimed that the government attempted to sidestep the justice system through the use of public inquiries and in doing so, shield those involved in the application of the five techniques from prosecution.

8.53 If the British government lacked commitment to the rule of law in relation to these two policies, the next chapter will examine the extent to which the courts, both domestic and international, were able to hold the British government in 'check' in relation to these policies.

[1045] *Report of the Committee to Consider, In the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd 5847, 1975) para 43 (The Gardiner Report).
[1046] ibid.

# Chapter 8: The Framing of the Conflict within International Law and the Role of the House of Lords and the European Court of Human Rights

9.1 The previous chapter examined the policies of internment and in-depth interrogation and how the British government chose to investigate alleged abuses relating to those policies. The focus of this chapter is to explore whether the European Court of Human Rights held the United Kingdom to account for alleged abuses in relation to these two policies, both during the Troubles and since the signing of the Good Friday Agreement in April 1998.[1047] It will also explore the role of the House of Lords during the Troubles and the role of lawyers in Northern Ireland.

## International Law and Northern Ireland

9.2 Determining which legal standard framed the conflict in Northern Ireland is a significant part of the conflict. Asserting that one legal framework is more appropriate than another, involves making claims about the nature of the conflict itself. Christine Bell has described this battle as a meta-conflict or a 'conflict about a conflict'.[1048]

9.3 In trying to assess the British government's commitment to operating within the law, it might be useful to look at how the British government's preferred international legal framework, namely the European Convention on Human Rights,[1049] came to be essentially the only international legal framework through which the conflict was contested. In addition, it might be helpful to examine the extent to which 'that legal framework served Britain well in terms of shielding the United Kingdom on the one hand, and on the other hand reinforcing its own

[1047] *The Belfast Agreement: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Ireland* (Cm 4292,1998).
[1048] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 2.
[1049] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 1 December 2017] [The European Convention]

conflict-narrative'.[1050] The suggestion being that this was less a commitment to the rule of law and more a commitment to self-interest.

## Human Rights and International Humanitarian Law

9.4 In the early years of the Troubles, the international legal framework governing the conflict was far from clear. The British government 'spent much of the Northern Ireland conflict emphasising the 'internal' nature of the problem'.[1051] In doing so it was attempting to limit the applicability of the alternative possible legal framework, namely international and non-international humanitarian law. However, at the start of the conflict in 1969, the Republic of Ireland contested its 'internal' nature. Articles 2 and 3[1052] of the Constitution of the Republic of Ireland[1053] contained a territorial claim to Northern Ireland. Acting on this territorial claim the Irish Republic attempted to internationalise the conflict through the United Nations.

9.5 In August 1969, the Republic of Ireland requested an urgent meeting[1054] of the Security Council under Article 35 of the UN Charter.[1055] Article 35 of the UN Charter provides that any member may bring any dispute or situation of the nature referred to in Article 34 to the attention of the Council or the Assembly. Article 34 provides that the Council (not the Assembly) may:

> Investigate any dispute or situation which might lead to international friction or give rise to a dispute in order to determine whether continuance of the dispute or

[1050] Colm Campbell, ''Wars on Terror' and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict' (2005) 54(2) British Institute of International and Comparative Law 321, 334.
[1051] Campbell (n1050) 329.
[1052] Following the Good Friday Agreement these Articles were amended and now unification can only come about peacefully and with the consent of a majority of both countries.
[1053] *Constitution of Ireland (last amended June 2004)* [Ireland], 1 July 1937, available at: http://www.refworld.org/docid/47a70815d.html [accessed 15 March 2018]
[1054] Campbell (n1050) 329.
[1055] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI available at: http://refworld.org/docid/3ae6b3930.html. [accessed 30 November 2017]

situation is likely to endanger the maintenance of international peace and security.[1056]

The written request by the Republic mentioned a desire to see a United Nations peacekeeping force deployed in Northern Ireland because the use of British troops was unlikely to restore peaceful conditions.[1057] In an attempt to get the written request included on the Security Council's provisional agenda, the Irish Minister for External Affairs, Dr. Hillery, addressed the Security Council. In his address, he emphasised that the Irish government did not accept that the United Kingdom had jurisdiction over the territory[1058] and strongly denied the applicability of the domestic affairs exception under Article 2(7). 'Dr. Hillery pointed out that the General Assembly had discussed the question of apartheid despite the fact that South Africa maintained that it came within Article 2(7).'[1059] South Africa's claim that the policy of apartheid was an internal matter had not prevented the General Assembly from discussing the matter. The argument being that the United Kingdom's claim that the conflict in Northern Ireland was an internal matter should similarly not prevent the matter being discussed in the General Assembly. Dr. Hillery also brought to the Council's attention the fact that Britain had argued in favour of United Nations intervention in the inter-communal troubles in Cyprus, a sovereign member State.[1060]

9.6 Article 2 (7) of the UN Charter states:

> 2. The Organisation and its Members, in pursuit of the Purposes stated in Article 1 shall act in accordance with the following Principles.
>
> (7) Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement

[1056] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI available at: http://refworld.org/docid/3ae6b3930.html. [accessed 30 November 2017]
[1057] Con Cremin, 'Northern Ireland at the United Nations August /September 1969' (1980) 1(2) Irish Studies in International Affairs 67.
[1058] Campbell (n1050) 329.
[1059] Cremin (n1057) 69.
[1060] ibid.

under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.[1061]

9.7 The Irish position gained valuable support from the USSR but not enough to win the day.[1062] The British representative, Lord Caradon, immediately insisted the principle of non-discussion of internal affairs stated in Article 2(7) operated to preclude Council jurisdiction.

9.8 The Irish government then attempted on 5 September 1969 to have an item entitled 'The situation in the North of Ireland' included on the provisional agenda for a regular session of the General Assembly, under Rule 15.[1063] The Permanent Representative of the Irish government, Con Cremin, sent a letter and accompanying explanatory memorandum to Secretary General, U Thant. In the memorandum, Con Cremin presented the Irish case for peaceful unification as the only plausible long-term solution for Northern Ireland.[1064] He argued that Northern Ireland was an issue for the UN because 'partition and human rights violations by the Stormont government ran counter to the Universal Declaration of Human Rights and the current situation was a danger to international peace because of its effects on Anglo-Irish relations'.[1065] The Irish government cited the UN Declaration on the Granting of Independence to Colonial Countries and Peoples[1066] and asked for the conflict to be reviewed from a discrimination perspective.

9.9 In a cable to the FCO, the British delegate to the UN, Lord Caradon, outlined possible British countermoves to the Irish request.[1067] He suggested that Britain's best course of action would be to try to resist the inclusion of the Irish item on the

[1061] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html. [accessed 30 November 2017]
[1062] Cremin (n1057) 67.
[1063] Daniel Williamson, *Anglo-Irish Relations in the Early Troubles: 1969-1972* (Bloomsbury 2016) 25.
[1064] ibid.
[1065] ibid.
[1066] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV), available at: http://www.refworld.org/docid/3b00f06e2f.html. [accessed 30 November 2017]
[1067] Williamson (n1063) 25.

agenda of the General Committee on the grounds of domestic jurisdiction.[1068] Lord Caradon objected to the Irish request and 'argued that his Government had taken positive and urgent action to deal with a difficult and delicate situation'.[1069] He went on to say that 'the reforms which we wish to see are being pushed ahead as a matter of urgency and that a debate on the item as proposed could only compromise peace and progress there'.[1070] Once again the British government successfully argued that the conflict was a domestic affair and referred to Article 2 (7) to prevent any debate on the issue.

9.10 The result was that the conflict in Northern Ireland was defined according to the British claim that the conflict was an internal matter. On both occasions the issue was raised at the United Nations Britain relied on its international standing to successfully block any debate that might have undermined its own conflict-narrative. This was despite the fact that the Sunningdale Agreement of 1973[1071] and the Anglo-Irish Agreement in 1985[1072] both gave the Republic a consultative role in the peace process.

9.11 Colm Campbell suggests that the British were at great pains to avoid any debate on the applicability of international humanitarian law to the Northern Ireland conflict for a number of reasons.[1073] Firstly, he argues that 'any discussion of the applicability of international humanitarian law to the Troubles opened up the possibility that not only did a liberal-democratic state have an *armed-conflict* taking place on its territory, it also may have been a participant in it'.[1074] In other words, there was a fear that such a categorisation might have damaged Britain's international standing. Secondly, the British government feared that such a debate would undermine its strategy of defining the conflict in terms of criminal activity

[1068] ibid.
[1069] Cremin (n1057) 70.
[1070] ibid 71.
[1071] The Sunningdale Agreement: Tripartate Agreement on the Council of Ireland-Communique issued following the Sunningdale Conference (9 December 1973) (The Sunningdale Agreement).
[1072] An Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland (Cmnd 9657, 1985) (The Anglo-Irish Agreement)
[1073] Campbell (n1050) 332.
[1074] ibid.

rather than a political struggle.[1075] Thirdly, there was desire to avoid 'the possibility of creating fresh obligations for itself (…) in respect of Northern Ireland'.[1076] The suggestion was that these additional obligations could have come from the application of Article 3[1077] common to the four Geneva Conventions of 1949[1078] and also Additional Protocols I[1079] and II.[1080]

9.12 The United Kingdom signed the two Protocols in 1977 but failed to ratify them until 1998. It has been suggested that this fear of creating additional obligations was the reason why the United Kingdom failed to ratify the two Additional Protocols[1081] to the 1949 Geneva Conventions for more than twenty years. The threat that either of the two Protocols might be applied to the situation in Northern

[1075] ibid 331.
[1076] ibid 332.
[1077] See Introduction for more detailed discussion of Article 3 common to the four Geneva Conventions of 1949.
[1078] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: http://www.refworld.org/docid/3ae6b3694.html [accessed 2 December 2017].
International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85, available at: http://www.refworld.org/docid/3ae6b37927.html [accessed 2 December 2017].
International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: http://www.refworld.org/docid/3ae6b36c8.html [accessed 2 December 2017].
International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: http://www.refworld.org/docid/3ae6b36d2.html [accessed 2 December 2017]
[1079] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 2 December 2017]
[1080] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 2 December 2017]
[1081] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 2 December 2017]
International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 2 December 2017]

Ireland, a threat that has been described as 'intangible',[1082] was nevertheless, sufficient to delay ratification.[1083] Campbell suggests that the 'wariness appears to have been based on a combination of diffuse and quite specific concerns'.[1084] A specific concern was that Additional Protocol II, if it was deemed to operate, would grant an amnesty at the end of the conflict[1085] to those who had participated in the violence.[1086] The idea of giving an amnesty to members of the IRA did not sit comfortably with the policy of criminalisation.

9.13 The two Additional Protocols were ratified in 1998, the year in which 'de-escalation and demilitarisation in Northern Ireland really began to take effect'.[1087] By the beginning of 1998 all of the major paramilitary groups in Northern Ireland had announced either ceasefires or a suspension of military operations.[1088] The fact that it took more than 20 years for the two Additional Protocols to be ratified and that their ratification coincided with what has been termed the 'transition'[1089] phase of the conflict is not a coincidence, according to some commentators.[1090]

9.14 What is more, in 1998 when the two Additional Protocols were finally ratified, the United Kingdom still remained cautious, and entered the following reservation which would have precluded the conflict in Northern Ireland falling within the scope of application of Additional Protocol I:

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[1082] David Turns, 'The 'War on Terror' Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues' (2007) 10(2) The City University of New York Law Review 435, 449.
[1083] ibid.
[1084] Campbell (n1050) 332.
[1085] ibid 326.
[1086] Article 1 of Protocol II defines its 'material field of application' as all internal armed conflicts taking place in the territory of a State Party 'between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.
[1087] Turns (n1082) 449.
[1088] Martin Melaugh, The Irish Peace Process – Chronology of Key Events (April 1998-December 1999) CAIN web site <http://cain.ulst.ac.uk/events/peace/pp9899.htm> accessed on 17 November 2017. On the 13 October 1994 the Combined Loyalist Military Council (CLMC) announced a ceasefire as of midnight. On the 20 July1997 the IRA renewed their ceasefire. On the 23 January 1998 the Ulster Freedom Fighters reinstated their ceasefire.
[1089] Campbell (n1050) 326. Campbell identified three broad phases in the Troubles: the 'militarisation' phase, which lasted from 1969 to 1976; followed by the 'criminalisation' phase (1977-1994) and the 'transition' phase from 1994-2004.
[1090] Turns (n1082) 448.

Re: Article 1, paragraph 4 and Article 93, paragraph 3

> It is the understanding of the United Kingdom that the term "armed conflict" of itself and in its context, denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.
>
> The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.[1091]

9.15 The combined effect of these reservations 'was to undercut[ing] Protocol I's application to national liberation movements'[1092] in the United Kingdom. The IRA claimed to be fighting a war of national liberation/self-determination in Northern Ireland, and in making such a claim positioned itself in such a way that it could have potentially made a declaration under Article 1(4). So even if the IRA had acceded to Protocol I, which at one point was the IRA's declared intention,[1093] the reservation by the United Kingdom would mean that Protocol I would not have applied.[1094] However, the British government's unequivocal position was that the violence in the Province did not amount to an armed conflict.[1095]

9.16 Additional Protocol II applies to non-international armed conflicts. In relation to Additional Protocol II, the British government denied that the violence in

[1091] Letter of 28 January 1998 sent to Swiss Gov't by Christopher Hulse, HM Ambassador of the UK quoted in Turns (n1082) 449.
[1092] Theodor Meron, 'The Humanisation of Humanitarian Law' (2002) 94(2) The American Journal of International Law 239, 272
[1093] ibid.
[1094] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) The European Journal of International Law 741, 755.
[1095] Campbell (n1050) 333.

Northern Ireland reached the threshold required for the application of Additional Protocol II. Article 1, paragraph 1 of Additional Protocol II requires that for hostilities to be categorised as a non-international armed conflict then the hostilities must take place:

> In the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[1096]

9.17 The applicability of Additional Protocol II to the conflict was much more likely than the applicability of Additional Protocol I. This was because it could have been argued that the IRA was under reasonable command and able to coordinate a sophisticated terrorist campaign. The IRA's leadership consisted of an Army Council that issued orders to its operational units and those orders were followed. The units were organised into 'commands', 'brigades' and 'battalions'.[1097] In addition, the IRA might arguably have met the control of territory conditions given their control of the 'No-Go' areas and certain rural areas such as South Armagh, where British Army patrols came under frequent sniper fire.[1098] Nevertheless, this view of the conflict failed to gain traction. Campbell states that 'for much of the conflict there was little attempt to view the violence through the

[1096] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 2 December 2017]
[1097] Turns (n1082) 450.
[1098] In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) affirmed that a Non-International Armed Conflict exists when there is 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'. This decision is widely accepted as establishing the two key criteria for qualification as a Non-International Armed Conflict: i) intensity of the hostilities; and ii) the involvement of an organised armed group. In other words, the requirement for territorial control was no longer seen as necessary in order to establish that a non-international armed conflict existed. See Louise Armatsu, Mohbuba Choudhury, 'The Legal Classification of the Armed Conflict in Syria, Yemen and Libya' (Chatham House Publication March 2014) <www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf> accessed 17 March 2018.

lens of humanitarian law apart from the occasional airing of the matter in the context of the status of IRA prisoners'.[1099]

9.18 The British government's obstruction of any discussion about the nature of the conflict in Northern Ireland at the Security Council or in the General Assembly and the failure of successive British governments to ratify the Additional Protocols until 1998 can be understood as straightforward devices used by the United Kingdom to on the one hand, protect itself, and on the other hand, reinforce the British conflict-narrative that the Troubles amounted an internal disturbance and that the violence was criminal in nature. Colm Campbell also suggests that 'one effect of the very long delay in the ratification of Protocols I and II seems to have been to direct attention away from even the limited provisions of common Article 3'.[1100]

9.19 With international humanitarian law effectively sidelined due to a failure to engage the UN Security Council and the UN General Assembly,[1101] then outside of domestic courts, the European Convention on Human Rights[1102] was the only way by which policies and practices and allegations of abuse in Northern Ireland could be challenged.

## The Role of the European Court of Human Rights in Relation to the Policies of Internment and In-depth Interrogation during The Troubles

9.20 In the first inter-State case ever heard by the Court, *Ireland v United Kingdom* in 1971[1103] although the existence of an emergency was conceded, it was claimed by the Irish government that the scale of detention was not strictly warranted by the

[1099] Campbell (n1050) 330.
[1100] Campbell (n1050) 333.
[1101] There was another attempt in 1972 by Amnesty International. Amnesty International documented incidents of torture of prisoners by the British in Northern Ireland and communicated those to the UN under its '1503' procedure which investigates allegations of 'gross and persistent violations of human rights.' The United Nations Sub-committee on the Prevention of Discrimination and the Protection of Minorities began considering the situation in Northern Ireland. But this was a secret investigation and so had no effect. See Howard Tolley, 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) 6(4) Human Rights Quarterly 420, 435.
[1102]The European Convention (n1049)
[1103] *Ireland v United Kingdom* Application No. 5310/71 (1972) 15 YB 67.

circumstances and that the five sensory deprivation techniques amounted to torture, a non-derogable right under Article 3. The fundamental issue for Ireland was whether the five techniques amounted to torture under Article 3 of the Convention. [1104]

9.21 The case was argued before both the European Commission[1105] on Human Rights in 1972 and the European Court of Human Rights in 1978.[1106] The Commission found that the five techniques amounted to torture under the Convention. The Commission unanimously held the 'combined use of the five techniques in aid of interrogation in the illustrative cases constituted a practice of inhuman treatment and torture in breach of Article 3'[1107] of the ECHR.

9.22 However, the finding of the Commission, in relation to the five techniques, was appealed in 1978. In *Ireland v United Kingdom,* the European Court of Human Rights ruled in relation to the five techniques and decided that although the five techniques met the threshold for inhuman and degrading treatment in breach of Article 3, they did not amount to torture. The Court's decision however clearly stated that interrogation in-depth contravened Article 3 of the Convention. However, the impact of that determination was entirely overshadowed by the decision of the Court that in-depth interrogation did not amount to torture. The Court stated:

> (167) Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and /or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood…

[1104] *Ireland's* application to the commission also made other allegations and these included an allegation that internment without trial breached article 5 and 6 (the right to liberty and security and a fair trial), an allegation that internment was discriminatory and in breach of Article 14 (the prohibition on discrimination).
[1105] *Ireland v United Kingdom* (1976) YB ECHR 512 (European Commission of Human Rights) (Report of the Commission) at 148. The European Commission no longer operates.
[1106] *Ireland v United Kingdom* (1978) 2 EHRR 25.
[1107] *Ireland v United Kingdom* (1976) YB ECHR 512 (European Commission of Human Rights) (Report of the Commission) 489-91. [*Ireland v United Kingdom* Report of the Commission]

(168) The court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment and was in breach of Article 3.[1108]

9.23 The difference of opinion between the two Convention agencies according to David Bonner 'arises from a different perception of the level of severity of suffering required in order to place the conduct at the torture point on the spectrum of maltreatment ranging from degrading treatment at one end and torture at the other'.[1109] This divergence of opinion was not down to significantly different definitions of torture.[1110] Instead, the Court emphasised the need for 'very serious suffering' and this led to the two very different opinions.

9.24 What is also of interest here is that because this was an inter-State dispute, the evidence in the case was adduced by the European Commission on Human Rights. The Commission complained that the United Kingdom 'did not always afford it the assistance desirable'.[1111] This would tend to undermine British claims to a determined commitment to operate within the law.

9.25 The Court also had to consider whether internment could be justified pursuant to Article 15(1) of the European Convention on Human Rights. Article 15(1) provides:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations

[1108] *Ireland v United Kingdom* (1978) 2 EHRR 25 para 167 and 168.
[1109] David Bonner, 'Ireland v United Kingdom' (1978) 27(4) The International and Comparative Law Quarterly 897, 900.
[1110] The Commission view, as expressed in the first *Greek Case*, considered that torture generally constituted an aggravated form of inhuman treatment, that is the infliction of severe mental or physical suffering, which is applied for such purposes as extracting information or confessions from victims. The Court's view was essentially similar and referred to torture as being 'deliberate inhuman treatment causing very serious and cruel suffering'.
[1111] *Ireland v United Kingdom* Report of the Commission (n1092) para 148.

under this convention to the extent strictly required by the exigencies of the situation.[1112]

9.26 The Court was the final arbiter in terms of what the Convention required but the derogating State was given a wide margin of appreciation[1113] both is terms of whether an emergency existed and in terms of what measures were required to overcome it. Whether or not an emergency existed was not looked at in *Ireland v United Kingdom* as the Court considered the existence of an emergency on Northern Ireland as obvious. The test laid down in *Lawless* as to whether an emergency existed was as follows: an exceptional situation of crisis or emergency that affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. [1114] The Court found that the situation in Northern Ireland satisfied this test.

9.27 In terms of internment, the issue came down to whether internment without trial was strictly required by the exigencies of the situation in Northern Ireland. In *Lawless* this question was broken down into two sub-issues. The first was whether any less harsh measures could have been sufficient to deal with the situation without resorting to internment without trial. The second issue was whether internment was subject to adequate safeguards to protect personal liberty as far as the situation allowed. In relation to the first sub-issue the Court decided that the actions taken by the United Kingdom were reasonable. In relation to the second sub-issue, the Court held that the Special Powers Act with what has been described as 'very limited, technically orientated judicial review'[1115] fulfilled the Conventions requirements. Clearly, the suggestion that internment was introduced for political reasons rather than for security reasons, if that could be proved, would mean that internment was not strictly required by the exigencies of the situation.

[1112] The European Convention (n1087).
[1112] *Ireland v United Kingdom* Application No. 5310/71 (1972) 15 YB 67.
[1113] *Brannigan and McBride* (1992) 17EHRR 539.
[1114] *Lawless v Ireland* (no.3) (1961) 1EHRR 15.
[1115] Bonner (n1094) 905.

9.28 However, this is not the end of the story in terms of *Ireland v United Kingdom*. New evidence has been unearthed recently in the British National Archives.[1116] These newly discovered documents suggest that the British government did not reveal all the evidence available during the course of the proceedings.[1117] Instead, it would appear that the British authorities produced evidence before the Court that was contradicted by its own internal evidence.

9.29 These newly discovered documents raise two issues. The first is that the British government was aware that the effect of the five techniques would be severe long-term mental and physical illness. Although the British government's expert witness Dr. Leigh argued that the acute psychiatric symptoms developed during interrogation were minor and related to the stress of living in Northern Ireland. Dr. Leigh's later assessment revealed a report written in 1975 that he had come to a very different conclusion after having assessed one of the 14 men. In the Report Dr. Leigh concludes that 'other psychiatric symptoms were probably the result of deep interrogation'.[1118]

9.30 The second issue is revealed in a recently discovered letter dated 31 March 1977 from Merlyn Rees, the then Home Secretary, to the British Prime Minister, James Callaghan. In the letter Merlyn Rees states, that:

> In his view (confirmed by Brian Faulkner) that the decision to use torture in Northern Ireland was taken by Ministers, in particular Lord Carrington, then Secretary of State for Defence and therefore, prosecutions of members of the security forces should not take place. The Ministry for Defence concurred.[1119]

9.31 This is significant because the UK government did not admit that the five techniques, as applied in Northern Ireland, amounted to allegations of ill treatment

[1116] Aisling O' Sullivan, 'The Torture Files: New Evidence of Use of the 'Five Techniques'' (14 June 2014) <http://humanrightsdoctorate.blogspot.com/2014/06/the-torture-files-new-evidence-of-use.html> accessed on 8 July 2016
[1117] ibid.
[1118] ibid.
[1119] ibid.

as claimed by the Irish government, let alone torture. Nor did the British government accept that any of the alleged acts were the responsibility of the United Kingdom's government. In fact, the United Kingdom's position was that the five techniques did not constitute ill treatment contrary to Article 3 and nor did the five techniques amount to an administrative practice. The letter from Merlyn Rees makes it quite clear that the five techniques were sanctioned at the highest level of government and taken at face value makes it appear that inside the British government the techniques were understood to be torture. However, the significance of the statement by Merlyn Rees ought to be put in context. Merlyn Rees was commenting on a previous Conservative administration and he may have been rather more circumspect had he been discussing decisions taken by a previous Labour government.

9.32 In light of this new evidence the Irish government on the 2 December 2014 decided to ask the Court to re-open the case[1120] under Rule 80 of the Rules of Court.[1121] The argument will be that the evidence suppressed by the British government, would have been enough, had it been known at the time, to secure a finding of torture under Article 3. Lord Bingham in *A v Secretary of State for the Home Department* (No.2) [2005] indicated that the five techniques might now fall within Article 1 of the Torture Convention[1122] and justify a finding of torture under Article 3.[1123] The implication is that the British government was not just less cooperative than would have been desirable as was suggested by the Commission, but instead the British government deliberately misled the Court.

9.33 In addition to decisions relating to the specific measures introduced by the British government to deal with the violence, the European Court of Human Rights also

[1120] Amnesty International, Ireland Decision to Reopen "Hooded Men" Court Case Triumph of Justice after Four Decades of Waiting <https://www.amnesty.org/en/press-releases/2014/12/ireland-decision-reopen-hooded-men-court-case-triumph-justice-after-four-de/> accessed 12 March 2018.
[1121] Under Rule 80 (1) 'a party may, in the event of the discovery of a fact which might by its nature have a decisive influence and could not reasonably have been known to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired the knowledge of the fact, to revise the judgment'.
[1122] The European Convention (n1049).
[1123] *A and others v Secretary of State for the Home Department* (No.2) [2005] UKHL 71 para 53

judged the arguments put forward by the British to justify derogating from Convention obligations.

9.34 Although the British government denied the existence of an armed conflict in Northern Ireland claiming that the level of violence was insufficient to amount to an armed conflict. The British did however acknowledge a lower level of violence, and claimed that the lower of violence was sufficient to constitute a public emergency that threatened the life of the nation under Article 15 of ECHR.[1124] That claim allowed the British government to enter a derogation under Article 15. The United Kingdom ratified the ECHR[1125] in 1951 and entered the first derogation under Article 15 in 1957. Between 1957 and 1984 continuous derogations were in force.[1126]

9.35 Brice Dickson has concluded that overall the 'European Court has been quite deferential to governments when assessing whether their decisions to 'derogate' from the Convention are justifiable.'[1127] Article 15 of the Convention requires a public emergency threatening the life of the nation. In agreeing with the United Kingdom that the IRA and other Republican terrorist groups presented such a threat, Dickson claims that the court has been 'quite indulgent to (…) the UK'.[1128]

9.36 Colm Campbell claims that the intensive interrogations that took place in one of the three specialised 'holding centres' involved extended detention that necessitated that the British government derogate under Article 15[1129] of the ECHR.[1130] In 1984, the United Kingdom withdrew its derogation from the ECHR in the mistaken belief that there was no incompatibility between its emergency and anti-terrorist legislation and the UK obligations under the Convention.

[1124] The European Convention (n1049).
[1125] ibid.
[1126] The dates of the notices are as follows: 25 September 1969, 20 August 1971, 23 January 1973, 19 September 1975, 12 December 1975 and 18 December 1978.
[1127] Brice Dickson, 'Counter-Insurgency and Human Rights in Northern Ireland' (2009) 32(3) Journal of Strategic Studies 475, 488.
[1128] ibid.
[1129] Campbell (n1050) 327.
[1130] The European Convention (n1049).

However, in *Brogan v UK* [1131] the court ruled that detention for four days and six hours without a derogation was incompatible with the Convention. The United Kingdom's response to this judgment was to issue a new derogation allowing detention for seven days. The new derogation was challenged in *Brannigan and McBride.* [1132] The conflict at this point was in its 20th year. The argument put to the Court was that the wide margin of appreciation allowed at the beginning of the conflict should be narrower after twenty years.[1133] The Court resisted this idea and instead allowed the United Kingdom to determine both the existence of an emergency and the measures necessary to deal with it. Dickson's conclusion being that the 'ECHR jurisprudence on Northern Ireland up to the end of 1994 was one of considerable deference to conflict-related state claims'. [1134] It is difficult to avoid the conclusion that that 'At this early stage, the European Court of Human Rights exercised no discernable constraint on operations.'[1135]

## The Role of Domestic Courts in Relation to the Policies of Internment and In-depth Interrogation

9.37 One way to assess the role of the courts in the conflict is to examine the number of times British government legislation and policies relating to counter-terrorist measures were successfully challenged in the domestic courts. Another way to gauge the role of the courts is to assess the level of judicial activism. In other words, to assess the extent to which the courts took the opportunity to raise issues of concern relating to the emergency legislation and government policies relating to the conflict. For example, the courts could have mentioned the fact that Parliament expended great effort and time on new legislation governing powers of arrest and search, but spent little time considering laws governing the use of lethal force by members of the Security Forces. Perhaps another example would be that the courts could have explored the potential application of international humanitarian law to the conflict. In other words, the role of the courts can be

[1131] *Brogan v UK* (1989) 11 EHRR 117.
[1132] *Brannigan and McBride* (n1106).
[1133] Amicus brief submitted by Liberty, Interights and the Committee on the Administration of Justice.
[1134] Campbell (n1050) 342.
[1135] Huw Bennett, 'Smoke Without Fire'? Allegations Against the British Army in Northern Ireland, 1972-5' (2013) 24(2) Twentieth Century British History 275, 286.

understood, not just in terms of successful challenges to legislation and practices, but also in terms of the issues that they raised when the opportunity presented itself. It is certainly possible for the Law Lords to respect the supremacy of Parliament, and yet at the same time make their views known.

9.38 The House of Lords remained the final court of appeal for most issues within Northern Ireland's domestic legal system including issues arising from the conflict and the government's response to the violence. According to Stephen Livingston between 1969 and 1993 only thirteen cases relating directly or indirectly to terrorism and the legal measures taken to deal with the terrorists reached the House of Lords. [1136] Brice Dickson has identified a fourteenth case, *Linton v Ministry of Defence* [1983], in which a man was injured during a shooting exchange involving soldiers and terrorists.[1137] Between 1994 and 2005 a further 12 conflict related cases were decided.[1138] Of these cases, not one dealt with the legality of the policy of internment or the legality of applying the five 'sensory' techniques.[1139]

9.39 In the 13 cases identified by Livingston, the judges had an opportunity to comment on various aspects of the conflict in Northern Ireland but chose not to. In these cases, using Livingston's terminology, the House of Lords 'found for the government'[1140] in all but two cases.[1141] Brice Dickson suggests that the decisions

[1136] Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57(3) The Modern Law Review 333, 334.
[1137] Brice Dickson, 'The House of Lords and the Northern Ireland Conflict – A Sequel' (2006) 69(3) Modern Law Review 383, 384.
[1138] ibid 388.
[1139] Livingston (n1136) 335 claims that four cases concern the use of force by the security forces in Northern Ireland (these are Attorney General for Northern Ireland's Reference (No.1 of 1975), *Farrell v Secretary of State for Defence* (1979), *McKerr v Armagh Coroner* (1990), *Breslin v Attorney General for Northern Ireland* (1992). Four cases relate to aspects of the criminal law and procedure (*Lynch v Director of Public Prosecutions for Northern Ireland* (1975), *Maxwell v Director of Public Prosecutions for Northern Ireland* (1978), *R v Brophy* (1982), *Murray v Director Public Prosecutions for Northern Ireland* (1994)). Two cases concern emergency arrest and search powers (*McKee v Chief Constable of the Royal Ulster Constabulary* (1984), *Murray v Ministry of Defence* (1988)). Two cases raise issues of political expression and opinion (*McEldowney v Forde* (1969), *Brind v Secretary of State for the Home Department* (1991)). The final case concerns prisons regimes (*Hone v Board of Visitors Maze Prison* (*1988*).
[1140] ibid.
[1141] *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] 1 ALL ER 913; *R v Brophy (Edward Manning* [1982] AC 476.

by the House of Lords showed 'widespread alignment with, and endorsement of, establishment values in the United Kingdom as a whole, a phenomenon which permeated the entire jurisprudence of their Lordships'.[1142] The criticism here is that the judiciary could have raised questions about the emergency legislation in Northern Ireland, but all too frequently did not. 'It is their failure to exercise this limited freedom between 1969 and 1993 which the Law Lords of the time can justifiably be blamed for.'[1143] The prevailing view appears to be that between 1969 and 1993, by deferring to the executive's appreciation of necessity during the Troubles the 'House of Lords ruled itself out of playing a role in the conflict'.[1144] Dickson summed up the situation stating that the courts 'were unable to hold the security forces properly to account for their wayward COIN practices'.[1145]

9.40 However, Dickson argues, that the twelve cases that were decided by the House of Lords between 1994 and 2005, reveal that the Law Lords have been willing to take a different approach. Dickson, however, having reviewed each of the cases in detail argues that the Law Lords became much more willing to factor in the context when dealing with conflict related cases. In one case, *R v Northern Ireland Human Rights Commission*[1146] he identified a clear admission by the Law Lords that 'when deciding cases from Northern Ireland they are often dealing with matters that are essentially political'.[1147] He concluded that that the Law Lords 'granted leave to appeal in more cases and (…) indulg[ed] in much fuller and more contextualised legal analysis when delivering their judgments'. [1148] His conclusion was that it could not be claimed that 'in the last decade the Law Lords have been inappropriately 'pro-government' in relation to Northern Ireland'. [1149]

[1142] Dickson (n1137) 388.
[1143] ibid 387.
[1144] Livingston (1136) 359.
[1145] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010) 23.
[1146] R v Northern Ireland Human Rights Commission [2002] NI 236.
[1147] Dickson (n1137) 411.
[1148] ibid 414.
[1149] ibid.

9.41 These two sets of cases were decided in different phases of the conflict. The first thirteen cases were decided during, what has been described as, the 'outbreak and militarisation' phase and the 'criminalisation' phase.[1150] The second twelve cases, on the other hand, were decided during the 'transition' phase. It is generally accepted that during the initial phases of the conflict, where the levels of violence are rising and unpredictable, the courts are more likely, using Livingston's terminology, to 'find for the government' than they are in the later stages when the violence has stabilised. The different treatment by the Law Lords of the two sets of cases may simply be a reflection of this. However, as Dickson himself points out,[1151] during the transition phase from violence to peace after 1994, when the second set of cases were decided, it is actually much more difficult to decide whether a decision is pro-government or not. This is because the two sides of the conflict at that time were working together and had what might be described as a common purpose. Therefore, it may be the case that judging decisions as pro-government or otherwise after 1994, has less significant than it had prior to 1994.

## The Role of Lawyers in the Conflict

9.42 Throughout the conflict the number of lawyers in Northern Ireland steadily increased. The number of barristers increased from 60 in 1965 to 330 in 1993. [1152] The number of solicitors increased from 500 to 1000 between 1965 and 1993.[1153] But despite this increase in the number of lawyers 'the closest many of them got to conflict related work is the processing of criminal injury claims'.[1154] Just 5% of lawyers in Northern Ireland were employed in conflict related work. [1155] Jackson and Doran observed that a very small core of barristers, perhaps just 20 or 30, regularly appeared for the prosecution and defence in conflict related trials.[1156]

[1150] See chapter 1 for a more detailed breakdown of the phases of the conflict.
[1151] Dickson (n1137) 417.
[1152] Brice Dickson, *The Legal System in Northern Ireland* (3rd edn SLS Publications 1993) 98.
[1153] ibid.
[1154] Stephen Livingston, 'And Justice for All? The Judiciary and the Legal Profession in Transition' in Colin Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart Publishing 2001) 131, 132.
[1155] ibid 132.
[1156] J Jackson, Sean Doran, *Judge without Jury* (Oxford University Press 1995) 83

9.43 The conflict in Northern Ireland presented, not only those lawyers involved in conflict related work, but the whole legal profession with an opportunity to consider the role and responsibility of lawyers in a conflict situation both, inside and outside, the court room. It required the legal profession to consider whether a narrow version of professionalism focusing on the provision of competent services was more appropriate than a wider version of professionalism encompassing broader social, political or moral responsibilities in a conflict situation. In other words, the conflict forced the legal profession to decide whether or not to support the traditionally held view that the legal profession was 'neutral' or 'independent', arguably a political position itself, or to challenge that view and instead see the role of lawyers as essentially political.

9.44 Instead of looking at the role of lawyers throughout the conflict, Keiran McEvoy has instead looked at the role of lawyers at 'critical junctures'.[1157] McEvoy defines 'critical junctures' as key phases of the conflict.[1158] In other words, critical junctures are:

> [D]efining moments in the history of organisations and institutions which offer us insights into how they work, the power relationships at work, within and without, the ways in which they are pressures and remembered, and thee ways in which they see themselves.[1159]

He has identified four key phases in the conflict. These are the emergence of a civil rights movement, internment, the introduction of the Diplock Courts, and the murders of two lawyers, Pat Finucane and Rosemary Nelson.

9.45 In the years prior to the outbreak of sustained political violence in 1969, Northern Ireland saw the rise of a civil rights movement. Those involved in the civil rights movement in Northern Ireland adopted tactics such as sit-ins, marches, and public

[1157] Kieran McEvoy, 'What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism' (2011) 74(3) The Modern Law Review 350, 355.
[1158] ibid.
[1159] Keiron McEvoy, Rachel Rebouche, 'Mobilising the Professions? Lawyers, Politics and the Collective Legal Conscience' in John Morison, Kieran McEvoy, Gordon Anthony (eds) *Judges, Human Rights and Transition* (Oxford University Press 2007) 275, 279.

demonstrations designed to expose the inequalities between the two communities and the sectarianism of the police.[1160] What is relevant here is that 'neither law nor lawyers played a particularly significant role in the civil rights struggle in Northern Ireland'. [1161] The various organisations involved in the civil rights movement [1162] appeared not to 'view legal challenges as central to delivering upon their objectives'.[1163] This was very different from the generally accepted role played by lawyers in the civil rights movement in the United States. In the United States, it is generally accepted that 'lawyers were instrumental in constituting the civil rights movement'.[1164]

9.46 In the early 1960s one of the first organisations to emerge was the Campaign for Social Justice (CSJ). This group was set up with the 'purpose of bringing the light of publicity to bear on the discrimination that exists in our country against the Catholic section of the community representing more than one-third of the total population'. [1165]

9.47 The group gathered evidence of discrimination and other forms of institutionalised malpractice and presented it in 1964 to the British Prime Minister, Sir Alec Douglas-Home. His response was that legal redress should be sought through the courts.[1166] The CSJ sought legal advice and was advised that 'discrimination practiced by Local Authorities is not capable of review by the courts under the terms of the Government of Ireland Act, 1920, or any other statutory provision'.[1167] The CJS then attempted to seek legal redress through the European Court of Human Rights[1168] but this failed at least in part 'because

[1160] Gregory Maney, 'Transnational Mobilisation and Civil Rights in Northern Ireland' (2000) 47(2) Social Problems 153.
[1161] McEvoy (n1157) 357.
[1162] Examples of organisations involved in the civil rights movement include the Campaign for Social Justice, the Derry Citizens' Action Committee and the Northern Ireland Civil Rights Association.
[1163] McEvoy (n1157) 357.
[1164] Austin Sarat, Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006) 7.
[1165] Campaign for Social Justice, *Why Justice Can Not be Done* (CJS 1964) 2
[1166] ibid.
[1167] ibid 3.
[1168] The European Convention (n1049).

Northern Irish solicitors were unable or unwilling to take on such cases'.[1169] McEvoy concludes that it is the 'comparative absence of lawyerly mobilisation or indeed significant attention to strategic litigation that is most noteworthy during the civil rights period'.[1170] The term 'strategic litigation' is not defined but presumably refers to focusing on cases involving allegations of discrimination or abuse of State power. In other words, strategic litigation involves identifying appropriate cases that could be used to promote and advance the civil rights agenda.

9.48 McEvoy claims that even organisations that focused on legal and constitutional liberties, for example the Northern Ireland Civil Rights Association (NICRA), appeared to place little faith in the courts to achieve legal redress. He makes the point that in 1969 NICRA did lodge various applications with the European Commission on Human Rights alleging that the banning of civil rights marches was a violation of the right to demonstrate.[1171] However, he also goes on to explain that these cases were removed from the list because the Commission determined 'the applicants have shown a clear lack of interest in pursuing these applications'.[1172] He also makes the point that this lack of sustained attention to litigation is also revealed in the archives of groups like the Derry Citizens' Action Group (DCAG), the Derry Housing Action Committee (DHAC) and the Peoples Democracy (PD).[1173] What McEvoy is describing is a lack of mobilization within the ranks of the legal profession and he refers to this absence of activity by lawyers as a 'culture of quietism'.[1174] He goes on to suggests that this was 'noteworthy' and 'striking' as the Province descended into violence'.[1175]

9.49 The second critical juncture that McEvoy identifies is the re-introduction of internment on 9 August 1971. At this point the legal profession had a choice. They could refuse to participate in the internment hearings and abandon their clients to represent themselves or take part in the hearings and in doing so

[1169] McEvoy (n1157) 358.
[1170] ibid 359.
[1171] ibid 359.
[1172] *A and Others v UK* (App No 3625 and others) (1970) Ybk 340, 434.
[1173] McEvoy (n1157) 358.
[1174] ibid 350
[1175] ibid 350, 359, 360.

legitimise the proceedings. Boyle and others have suggested that the decision by lawyers to participate in the internment proceedings is partly down to a desire to help their clients but was also 'in part due to the very substantial remuneration which had been provided'.[1176]

9.50 The third critical juncture identified by McEvoy was the introduction of Diplock courts. Lord Diplock was asked to consider 'what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations… otherwise that by internment'.[1177] The Diplock Report[1178] made various recommendations designed to facilitate the conviction of suspected terrorists.[1179] Arguably the most significant was the introduction of juryless trials and then later the 'supergrass' trials. McEvoy concludes that the legal profession in Northern Ireland again failed to speak out against these fundamental changes. Stephen Livingston similarly concludes that 'lawyers generally avoided public statements on emergency legislation, its content and its application'.[1180]

9.51 The fourth critical juncture identified by McEvoy was the murder of Pat Finucane in 1989 and Rosemary Nelson in 1998. He comments that the 'culture of quietism is perhaps best highlighted by the response of the legal profession to the murder of two of its own members, defence solicitors, Pat Finucane and Rosemary Nelson'.[1181]

9.52 The Law Society issued a statement condemning the murders but failed to follow this up with a call for a Public Inquiry for nearly ten years. The American based Lawyers Committee for Human Rights in 1993 stated that 'We are left with the impression that for the large part of the legal profession in Northern Ireland, the

[1176] Kevin Boyle, Tom Hadden, Paddy Hillyard, *Law and the State: The Case of Northern Ireland* (Martin Robertson 1975) 67.
[1177] *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmnd 5185, 1972) (Diplock Report).
[1178] ibid.
[1179] See chapter 2 para 3.66-3.72
[1180] Livingston (n1136) 133.
[1181] McEvoy, Rebouche (n1159) 284.

obligations of lawyers to assert fundamental human rights against abuses of the state is a low priority.'[1182]

9.53 Various reasons have been identified as to why lawyers did not speak out. They include the fact that the legal profession was small and tended to be made up of small firms and sole practitioners. The argument is that this tended to work against lawyers coming together to work as a unified profession.[1183] Another factor that has been identified to explain why lawyers acted the way they did is the nature of the conflict itself. Lawyers that spoke out in defence of the rule of law were by definition challenging the British government's response to the violence. In a situation where loyalty to the State was a fundamental dimension of the conflict it is perhaps not surprising that lawyers remained silent.[1184] Another obvious reason why lawyers remained silent was they feared for their lives. The Lawyers Committee for Human Rights concluded that '...credible evidence suggests that Patrick Finucane's murder was simply the most heinous instance of systematic harassment of defense lawyers for simply doing their job'.[1185]

9.54 Another reason that has been suggested why lawyers failed to speak out is that by distinguishing themselves from the problem, lawyers were able to remain above the conflict and by doing so ensured that the law was available to all.[1186] Livingston has summed up the situation stating that a 'paradigm of neutrality, plus fear and a sense of independence would appear to have constrained Northern Irish lawyers from contributing to the extensive public debate which has raged on the institutions of justice'.[1187] Perhaps yet another reason why lawyers failed to be more visible in the early years of the conflict was that they viewed their role as merely providing competent legal services based on the instructions of their clients. This narrow interpretation of professionalism, sometimes referred to as the 'standard conception' of a lawyer, was and still is widely accepted within the

[1182] Lawyers Committee for Human Rights, *Human Rights and Legal Defense in Northern Ireland* (1993) 41 quoted in McEvoy, Rebouche (n1159) 287.
[1183] McEvoy (n1157) 378.
[1184] ibid 380.
[1185] Lawyers Committee for Human Rights, *Human Rights and Legal Defense in Northern Ireland* (1993) 25 quoted in McEvoy, Rebouche (n1159) 287.
[1186] Livingston (n1136) 139.
[1187] ibid.

profession. It might also be the case that lawyers were cynical about the ability of the Unionist dominated judiciary to rule in their favour and consequently held little faith in the justice system as a mechanism to bring about change.

9.55 Although McEvoy is describing what he describes as a culture of quietism he makes the point that it would be wrong to 'give the impression that lawyers were entirely silent during the formative years of the civil rights era'. [1188] It is also the case that although lawyers may have shied away from the criminal courts, they were more active in getting their clients compensation through civil actions for damages. [1189]

9.56 Whatever the reasons for what has been described as this 'shameful organisational silence' [1190] the real question in relation to this thesis is what were the consequences of this silence on the activities of successive British governments. In other words, had lawyers spoken out about changes to the judicial system and the introduction of emergency legislation, would it have made a difference? The question requires a certain amount of speculation but Stephen Livingstone has made it clear that in his opinion a mobilised legal profession would have made a difference.[1191] He described Northern Ireland during the Troubles as a 'society without effective functioning political institutions' [1192] and therefore the 'deafening silence'[1193] from Northern Ireland's legal profession, in relation to the emergency legislation and policies, meant that the British government could introduce legislation and polices without fearing criticism. That is not to suggest that a mobilised legal profession could necessarily have successfully challenged any of the legislation or the policies introduced by the British government to deal with the violence. However, even unsuccessful legal challenges and press announcements from a profession with such symbolic capital might have had an impact on what successive British governments felt they could get away with.

[1188] McEvoy (n1157) 359.
[1189] Please refer to paras 5.75-5.81
[1190] McEvoy, Rebouche (n1159) 292.
[1191] Livingston (n1136) 139.
[1192] ibid.
[1193] McEvoy (n1157) 383.

## Conflict Legacy Cases

9.57 The array of measures and devices that were utilised by the British government to limit the reach of law during the Troubles was comprehensive. Yet since the peace process began successive British governments have introduced yet more mechanisms and devices to frustrate attempts to shine a light on the State's past activities and by doing so limit accountability.

9.58 The British government proposed a package of measures to deal with the legacy of the conflict in response to a series of cases that came before the European Court of Human Rights sometimes referred to as the '*McKerr*' group of cases.[1194] In these cases the court found against the United Kingdom in relation to a failure to provide effective and independent investigations under Article 2 of the ECHR.

9.59 In the '*McKerr*' group of cases the court set out the minimum requirements for such investigations which were that the investigation should be initiated by the State, independent, effective, sufficiently open to public scrutiny, involve the next of kin to the extent necessary to safeguard their legitimate interests and be prompt and carried out with reasonable expedition. The British government proposed that Coroner's Courts and inquests could meet these Convention obligations in relation to unresolved contentious killings. Coroners Courts seek the truth, they lay blame, witnesses can be compelled to be subject to cross-examination and families are fully engaged and represented.

9.60 However, the Committee for the Administration of Justice has identified six limitations that it argues cumulatively prevent this mechanism meeting Article 2 requirements. The key issues include both intrinsic problems with the system and include criticisms which relate to how efficiently inquests are being administered in practice.

[1194] *McKerr v United Kingdom* (application number 28883/95) [2002] ECHR 329; *Hugh Jordon v the United Kingdom* (application number 24746/94)) [2001] ECHR 328; *Shanaghan v the United Kingdom* (application number 37715/97) [2001] ECHR 330; *McShane v United Kingdom* (application number 43290/98) [2002] ECHR 469, *Finucane v the United Kingdom* (application number 29178/95) [2003] ECHR 328. There are two other cases in this group; *Hemsworth v UK*, judgment final on 16 October 2013 and *McCaughey & others*, judgment final on 16 October 2013.

9.61 The key issues include:

- the process of appointing a jury is anonymous and therefore there is inadequate provision for vetting jurors who may have a conflict of interest or potential bias;
- an inquest jury in Northern Ireland, unlike elsewhere in the United Kingdom, needs to reach a unanimous decision;
- inquests in Northern Ireland cannot issue verdicts of lawful or unlawful killing, which falls short of international standards;
- there are protracted delays and litigation involving the Police (PSNI) and armed forces ministry (MOD) in relation to disclosure to next-of-kin, of material that is submitted to be relevant, such as details of witnesses' involvement in other lethal force incidents which falls within the broader circumstances of the death;
- there are concerns about failures to secure attendance of security force personnel at the hearing; and
- inquests continue to be subject to excessive delays.[1195]

9.62 Whether or not the coronial system can in theory provide an Article 2 compliant mechanism remains controversial but what is clear is that in practice very few legacy inquests have actually taken place. Fifty-six cases involving ninety-seven deaths are still outstanding and twenty-two of those cases are over 40 years old. The system is plagued with inordinate delays. The Lord Chief Justice, Sir Declan Morgan QC, in his annual address to mark the opening of the new legal year, said that addressing the significant backlog of legacy inquests was a matter of real concern. He warned that 'If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040.'[1196]

[1195] Committee on the Administration of Justice, Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Committee Against Torture on the UK's 5th Periodic Report under the Convention Against Torture [April 2013] para 19 <http://www.tbinternet.ohchr.org/Treaties/CCPR/…/GBR/INT_CCPR_INT_CAT_NGO_GBR_50_19801_E-3.doc> accessed on 17 March 2017.

[1196] Alan Erwin, 'Northern Ireland judge warns inquests into deaths involving alleged state collusion could go on until 2040' *Belfast Telegraph* (Belfast, 17 November 2014)

9.63 The ability of the coronial system to meet Article 2 obligations was questioned by the European Court when dealing with *McCaughey and Grew v the United Kingdom*.[1197] The Court ruled that delays are incompatible with the State's obligations under Article 2 to ensure effective investigations into suspicious deaths.[1198] Judge Kalaydieva went further and suggested that State agents were benefitting from virtual impunity. She stated that:

> After decades of being faced with demonstrated reluctance and what would appear to be an attempted obstruction of justice…The period demonstrated, if not deliberate, systemic refusals and failures to undertake timely and inadequate investigation and to take all necessary steps to investigate arguable allegations under Article 2 and 3 seem as a matter principle to make it possible for at least some agents of the state to benefit from virtual impunity as a result of the passage of time.[1199]

9.64 The effect of these delays is to protect the State and its agents from being held to account for past abuses. The Committee on the Administration of Justice have concluded that the 'evidence points to a common purpose between the UK government and elements within the security establishment to prevent the truth coming out and maintain a cover of impunity for state agents'.[1200] This conclusion is partly based on the fact that the British government has firstly expanded the scope of the 'national security' exemption when releasing information and

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<http://www.belfasttelegraph.co.uk/news/Norther-Ireland/Northern-Ireland-judge-warns-inquests-into-deaths-involving-alleged-state-collusion-could-go-on-until-2040-30750819.html> accessed 17March 2017.

[1197] *McCaughey and Grew v the United Kingdom* (application number 43089/09) [2013] ECHR 682.

[1198] *Hemsworth v the United Kingdom* – Chamber Judgment (application number 58559/090 [2013] ECHR 683 para 73.

[1199] *McCaughey and Grew v the United Kingdom* (application number 43089/09) [2013] ECHR 682 p38.

[1200] Committee on the Administration of Justice, 'The Apparatus of Impunity Human Rights Violations and the Northern Ireland Conflict: A narrative of official limitations on post-Agreements investigative mechanisms' (Committee on the Administration 2015) 40 <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15131009/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf> accessed 17 March 2017. (CAJ Apparatus of Impunity)

secondly has introduced what have been referred to as 'secret courts'.[1201]

9.65 The ability to effectively investigate the past is obviously dependent on having access to the evidence. The British government transferred responsibility for covert policing to the Security Service in October 2007. The transfer was announced in Parliament in 2005[1202] and the details were set out in the annex provided by the British government to the 2006 United Kingdom-Ireland St Andrews Agreement.[1203] One consequence of the transfer of responsibility to the Security Service is that this area of policing falls within the sphere of national security and therefore beyond the reach of the oversight bodies such as the Northern Ireland Policing Board and the Police Ombudsman. Another consequence is that because the Security Service has a blanket exemption from disclosing information under the Freedom of Information Act, information that could have potentially have been accessed previously, is now unavailable.[1204]

9.66 In 2010, the British government drafted a Protocol for the handling arrangements for national security related matters.[1205] The Protocol states that the British government will retain responsibility for 'those aspects of the PSNI's work – past, present and future - that have a national security element or dimension'.[1206] The obvious problem will be how to determine whether a case has a national security dimension given that the term national security is not defined in any legislation. The risk is that the Protocol could be used to control disclosure of material in relation to legacy cases in Northern Ireland.

9.67 The United Nations Commission on Human Rights has created a 'Set of Principles for the Protection and Promotion of Human Rights through Action to

[1201] ibid.
[1202] Written Ministerial Statement, National Security Intelligence Work, Paul Murphy MP, Secretary of State for Northern Ireland, House of Commons Official Record, 24 February 2005, column 64WS.
[1203] Annex E UK - Ireland St Andrews Agreement 2006.
[1204] Freedom of Information Act 2000 s23-24.
[1205] NIO Protocol on Handling Arrangements for National Security Related Matters after the Devolution of Policing and Justice to Northern Ireland Executive quoted in CAJ Apparatus of Impunity (n1187).
[1206] NIO Protocol on Handling Arrangements for National Security Related Matters after the Devolution of Policing and Justice to Northern Ireland Executive Annex A para 3.1. quoted in CAJ Apparatus of Impunity (n1179).

Combat Impunity' (UN Impunity Principles).[1207] The Principles define impunity as:

> The impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings- since they are not subject to an inquiry that might lead them to being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties and the making of reparations to the victim.[1208]

These Principles provide 'an authoritative 'soft law' statement of international standards applicable to the UK and are binding where they are otherwise reflected in customary international law'.[1209]

9.68 The second development has been the use of what have been termed 'Secret Courts'. These Closed Material Procedures are remarkable because not only are the press and the public excluded from the court but also the parties (other than the State) and their lawyers are excluded at from the court. Evidence is presented to the court but the parties have no opportunity to see or hear it and more importantly challenge it. A 'Special Advocate' is appointed to represent the parties but he/she is not allowed to discuss the evidence that has been presented in secret. All that the Special Advocate is allowed to reveal is a general overview of what is being alleged. The United Nations Committee against Torture commented that 'Closed Material Procedures may adversely impact on the possibility to establish State's responsibility and accountability'.[1210]

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[1207] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 17 April 2013, A/HRC/23/40, available at: <http://www.refworld.org/docid/51a5ca5f4.html> accessed 17 December 2017]

[1208] ibid.

[1209] Daniel Holder, 'Covert policing and collusion, running informants and the human rights framework' (Committee on the Administration of Justice 2016) <http://www.caj.org.uk/files/2016/5/12/Covert_Policing_and_Ensuring_Accountability_Ten_Years_on_from_the_Corey_Collusion_Inquiry_Reports_Now.pdf> accessed 12 February 2017.

[1210] United Nations Committee against Torture, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) para13 (c) at <www.crae.org.uk/media/63835/cat-concluding-observations-may-2013.pdf> accessed 16 December 2017.

9.69 Two of the first five applications for Closed Material Procedures were cases relating to the Troubles in Northern Ireland. The first case was a civil claim by Margaret Keeley who is suing the Police Service of Northern Ireland, the MOD and Freddie Scapaticci. Scapaticci is alleged to have been a British Army agent codenamed 'Stakeknife' while being the head of the IRA's internal security unit, a unit linked to more than 50 murders.[1211] Margaret Keeley alleges that she was wrongfully arrested and falsely imprisoned by the police in order to protect her husband's cover. On her release from police custody the IRA's security unit interrogated Margaret Keeley. The second case involves Martin McGartland who alleges that the IRA shot him after it was discovered that he was an informer working for the Security Service.[1212] His claim is that the Security Service failed in its duty of care towards him.

9.70 These cases had the potential to uncover human rights violations by a British agent and expose unlawful behaviour by the State. However, successful applications by the British government for Closed Material Procedures ensured this did not happen. This is despite the fact that this legislation was never intended to be used in conflict-related cases but instead had been implemented to deal with terrorism related to Islamic extremism.

9.71 Another development has been the replacement of the Tribunal of Inquiries Act 1922 with the Inquiries Act 2005. The new Act according to Hillyard 'reduces substantially the independence of an inquiry and also provides the Minister with the power to determine what aspects of the inquiry should be held in public and what should not be revealed'.[1213] Hillyard speculates that 'Cynically the change could be seen as a way to grant an inquiry which could then be tightly controlled.'[1214]

9.72 It would appear that successive British governments continue to try and protect those involved in allegations of abuse from being held to account. Nils Muižnieks,

[1211] *Keeley v Chief Constable Police Service Northern Ireland* (PSNI) and others (2008 No 133645).
[1212] *McGartland and another v Attorney General* [2014] EWCH 2248 (QB).
[1213] Paddy Hillyard, 'Perfidious Albion: Cover-up and collusion in Northern Ireland' (2013) 22(4) Statewatch Journal 1, 11.
[1214] ibid.

the Council of Europe's Commissioner for Human Rights, speaking in Belfast on the 6 November 2014 stated that:

> Until now there has been virtual impunity for the state actors involved (…). The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general.[1215]

9.73 The overall picture seems to be that during the Troubles both domestic and international courts failed to effectively constrain successive British governments. The legal profession also chose not voice any concerns relating to either legislation or policies of the British government and the practices of the Security Forces. In doing so successive British governments, lacking commitment to the rule of law, were allowed to operate free from criticism from those at all levels of the legal system.

## Conclusions

10.1 The question posed at the beginning of this thesis was to what extent was the law able to constrain or limit the activity of the British State during the conflict in Northern Ireland. The question clearly relates to the role of Parliament and the courts, but also relates to the commitment shown by the British government to operating within the law and the rule of law. That is, how far was the British government prepared to put aside its own aims and objectives, in order to promote the rule of law?

10.2 In order to answer the question, the role of Parliament and the role of the courts, two of the three principal institutions of a State, have been examined in relation to the extent to which both limited the activity of the British government and other State actors. In order to assess the level of commitment to the rule of law the attitudes of senior ministers, civil servants, senior military officers and soldiers

[1215] Vincent Kearney, 'UK must pay for Troubles killings investigations says European official' BBC News 6 November 2014 <http://www.bbc.co.uk/news/uk-northern-ireland-29941766> accessed 20 August 2017.

have also been examined. The attitudes held by these different groups can be inferred from comments that were made at the time and deduced from what was actually done. Although the research provides a fragmented picture, it is still possible to draw some conclusions about the extent to which the law limited the activity of the State and State authorities and agents.

10.3 In looking at the role of the courts, the focus was on the role of both the House of Lords and the European Court of Human Rights. In terms of the House of Lords, what emerged was that the role of the courts changed over the course of the conflict. At the outbreak of the conflict the House of Lords consistently decided cases 'in the government's favour'[1216] and shied away from using the opportunity when dealing with conflict related cases to comment on any aspect of the emergency legislation, content or application, or the appropriateness of framing the conflict outside the scope of humanitarian law. In other words, there was a clear lack of judicial activism. The Law Lords did not appear to view their role as positioning the court between the rights of the people and the excesses of government. The conclusion being that the House of Lords failed to operate as a 'check' on the activities of successive British governments for the first twenty-five years of the conflict. This may not have been the case, at least to the same extent during the transition phase of the Troubles post 1994, but during the most violent years of the conflict, when arguably the most draconian measures were introduced, the role of the House of Lords was minimal in constraining government activity.

10.4 The role of both the European Court of Human Rights and the European Commission of Human Rights has also been examined. It appears that both the European Court of Human Rights and the European Commission, during the first two phases of the conflict between 1969 and 1994, deferred to conflict-related claims made by the British government. This was the case in relation to the existence of an emergency and the methods necessary to deal with that emergency. This deference limited the role of the Court and Commission in constraining the activity of successive British governments and came at a cost to

[1216] Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57(3) The Modern Law Review 333, 335.

human rights in Northern Ireland. The conclusion being that neither the domestic nor the international courts constrained, to any real degree, the activities of the British government during the Troubles.

10.5 In relation to the role of Parliament what emerged was that although the emergency legislation for Northern Ireland was enacted at Westminster where it ought to have been heavily scrutinised, there are compelling reasons to think that the scrutiny was less than it might have been. The first is that all major political parties in the United Kingdom took a bi-partisan approach to conflict related matters. That bi-partisan approach may well have resulted in proposed Bills receiving less attention than they would have otherwise done. The second is that the amount of attention given to any proposed Bill was limited by the mechanism by which the proposed legislation was introduced. Emergency legislation in Northern Ireland was introduced through Orders in Council. However, Orders in Council are secondary legislation and as a consequence any Parliamentary debate 'is limited to no more than one–and-a-half hours, and the draft must be approved or rejected in its entirety'.[1217] The third reason why Parliamentary scrutiny may have been limited was because only 17 out of the 650 Members of Parliament represented constituencies in Northern Ireland. This, in combination with the intractable nature of the problem, may have provided little incentive to devote attention to the proposed legislation. The conclusion is that successive British governments had the opportunity to introduce emergency legislation drafted in vague terms, granting sweeping powers to the Security Forces, and have confidence that the legislation would be passed by both Houses of Parliament.

10.6 The doctrine of the separation of powers suggests that the principal institutions of state, the executive, the legislature and the judiciary, should be divided in person and in function in order to safeguard against tyranny. During the Troubles the operation of that doctrine came under pressure because all major political parties in the United Kingdom adopted a bi-partisan approach to conflict related matters and there was a lack of judicial activism by the Law Lords. In addition, the

[1217] Leo Whelan, 'The Challenge of Lobbying for Civil Rights in Northern Ireland: The Committee of the Administration of Justice' (1992) 14(2) Human Rights Quarterly 149, 151.

European Court of Human Rights and the European Commission were overly deferential so reducing the ability of these institutions to effectively limit the British government's activities in Northern Ireland.

10.7 What has also emerged is that the legal profession in Northern Ireland, both barristers and solicitors, chose not to comment on the emergency legislation and policies introduced by the British government to deal with the conflict. Their silence removed yet another layer of potential opposition to any British government initiatives in the Province.

10.8 With little effective opposition, a very quiet House of Lords and legal profession and over deferential European institutions, the British government had considerable freedom in terms of how and what legislation it drafted and what policies it introduced to deal with the conflict in Northern Ireland.

10.9 In order to assess the extent to which the law acted as a constraint during the conflict, it was necessary to try to piece together the prevailing attitudes to the law and the rule of law, held by government ministers, civil servants, senior British Army officers and soldiers.

10.10 In relation to government ministers the picture that emerged was that all too often members of the government failed to prioritise either the law or the rule of law. There is evidence to suggest that this attitude towards the law and the rule of law existed at the top of government and members of the cabinet.

10.11 Chronologically, the first significant failure by the British government to uphold the law was in relation to the constitution and the role of the British Army. Right from the beginning, the emergency situation in Northern Ireland brought into sharp relief the disparity between the constitutional status of the military and the assumptions made in a democratic State about who controls the British Army. Under the constitution, the military are under a duty to suppress public disturbances as and when they occur. However, the British government introduced administrative practices that effectively transferred control of the British Army to the government. In doing so the British government undermined

both the constitutional status of the military and the rule of law. These administrative norms that had no basis in law, but which nevertheless placed power in the hands of the British government, were prioritised over the constitution. The conclusion being that successive British governments were not constrained by constitutional law in their dealings with the British Army.

10.12 This was followed closely by further failures to uphold the law. For example, the British government allowed the continued existence of 'no-go' areas and there is some evidence to suggest that known members of the IRA, a prohibited organisation, were deliberately not arrested. In addition, there were failures by the British government in relation to the policies of internment and in-depth interrogation that were introduced in 1971. Days before internment was introduced, Edward Heath told his cabinet that although internment would more than likely put the United Kingdom in breach of its obligations under the European Convention of Human Rights, it was nevertheless necessary in the circumstances given the escalating violence in the Province. That statement alone is evidence that acting within the law was not the main priority.

10.13 In relation to the use of the five sensory-deprivation techniques there is also evidence to suggest that the government sanctioned the use of these techniques on a small group of detainees that were interned. There is also evidence that at the highest levels of government these techniques were understood to be torture. The Home Secretary, Merlyn Rees, described the five techniques as torture in correspondence with James Callaghan, the then Prime Minister. There is also evidence to suggest that the British government failed to fully co-operate with fact-finding attempts by the European Court of Human Rights in a case relating to these five techniques, and at worst, intentionally deceiving the court in order to shield itself from a more damning verdict.

10.14 This evidence reveals glimpses of the attitudes held by those at the highest levels of government to operating within the law in relation to these policies. The introduction of both policies would indicate a clear lack of commitment to operating within the rule of law given that there was an acknowledgment that one of the policies would leave the United Kingdom in breach of its European

Convention obligations and the other was understood to amount to torture. Given the highly contentious nature of these two policies and the level of media scrutiny they would inevitably attract, if the British government lacked commitment to operating within the rule of law in relation to these policies then it seems reasonable to assume that the British government lacked commitment to operating within the rule of law generally.

10.15 That assumption appears to be borne out in relation to covert operations. Although the British government relied heavily on clandestine investigations in its fight against terrorism in Northern Ireland, these activities were never legally regulated. There is also credible evidence to suggest that the basis of policing was changed from preventing and detecting crime and maintaining law and order to that of gathering intelligence. This change was based on the recommendations set out in a secret report known as the Walker Report. Sir Patrick Walker was a senior civil servant working for the Security Service and the report was commissioned by the RUC. These changes to the basis of policing could never have been lawful unless an act of parliament had authorised them.

10.16 The Home Office has confirmed the existence of the Walker Report but refuses even now, nearly fifty years later, to release the Walker Report to the public on the grounds of national security.[1218] The more cynically minded might suggest that the real reason the Walker Report is still being withheld from the public is that it is just too damning of all those involved and reveals a contempt for the law that might provoke a public outcry and calls for a public inquiry even now.

10.17 This change to the basis of policing had far-reaching implications for the conduct of covert operations. Covert operations in Northern Ireland relied heavily on information from informers. The use of informers will always present intractable dilemmas but during the conflict there is evidence that informers were allowed to continue to commit serious offences and were then protected from prosecution in order to allow the flow of intelligence to continue. In other words, some crimes

[1218] At the time of writing this thesis the Walker Report had not been released to the public. However, in 2018 a lightly redacted copy of the report was released by the Police Service of Northern Ireland to the Committee for the Administration of Justice.

were never investigated properly and informers were protected at the expense of other people. There is also strong evidence to suggest that members of the Security Forces colluded with the UDA to murder IRA members and suspected IRA members. [1219]

10.18 In relation to the British Army the allegations go further. It has been claimed that the British Army also relied on intelligence collected using clandestine operations involving surveillance and undercover units. The suggestion is that these undercover units assassinated members of the IRA during the Troubles. [1220]

10.19 The fact that covert investigations were unregulated throughout the Troubles and that there is credible evidence that the basis of policing was changed without parliamentary approval or knowledge, reveals a total contempt by the British government for the rule of law. It suggests that at least some elements of the British State felt it could act with impunity. The fact that elements of the British Army colluded with the UDA or worse still were themselves involved in assassinating members of the IRA is again a clear indication that the law utterly failed to constrain the activity of certain elements of the Security Forces.[1221]

10.20 In order to gauge the extent that senior British Army officers were constrained by the law, the contingency plans drawn up for Northern Ireland were examined in some detail. The contingency plans, namely the Tuzo Plan and Operation Folklore, were initially drawn up by the British Army but then later contributed to by other government departments. The contingency plans were drawn up to deal with a situation of escalating violence falling short of civil war. The plans involved increasing legal powers under the Special Powers Act but more importantly involved introducing powers that were described in the plans as 'powers of a different kind'. These powers of a 'different kind' included removing the need for soldiers to act with minimum force, which would require a suspension of the common law and the instructions on the Yellow Card. The Tuzo Plan included powers to open fire other than at a target, and a right to use heavy

[1219] Please refer to paras 6.19-6.23.
[1220] Please refer to paras 6.24-6.30.
[1221] Please refer to paras 6.31-6.42 and 6.42- 6.47.

weapons. Perhaps most disturbingly both plans included a right to open fire when there was no threat to life. The Plans also included a blanket immunity for British soldiers.

10.21 These powers would have been problematic at a domestic level and would have put the United Kingdom in breach of its duties under the European Convention of Human Rights. The plans were never implemented but they reveal that for those involved in drawing up the plans, senior military officers and senior civil servants, the legality of the plan was a low priority. Although the picture is very fragmented there are glimpses of an approach that effectively sidelined the rule of law. Once again, the implication is that parts of the British State, namely the military and the Civil Service, did not feel constrained by the law. This lack of commitment towards the law by officers in the British Army was also revealed when British Army officers gave evidence to the Parker Inquiry. It emerged that the military 'forgot' to even inquire about the legality of in-depth interrogations before applying the five sensory-deprivation techniques to the detainees.

10.22 In order to assess the extent to which the ordinary criminal law was able to effectively constrain the behaviour of individual soldiers in Northern Ireland, it was first necessary to assess the chance of a soldier being convicted of a serious crime and then look at the length of time a soldier could expect to serve in prison if convicted.

10.23 What seems clear is that using the ordinary criminal law, although entirely legally proper, proved problematic when dealing with soldiers during the Troubles. It proved problematic because so few soldiers were charged with offences, and of those that were charged even fewer were convicted. The four soldiers that were convicted of unlawful killings, one had his conviction quashed on appeal and the other three served less than four years in prison before returning to serve with their units.

10.24 This may have been down to the fact that the investigation process and the prosecution process were far from normal when British soldiers were suspected of committing serious offences. The investigation process was delegated by the RUC

to the British Army Police, and the prosecution process gave senior members of the military influence over the ultimate decision of the DPP to prosecute. The change to the investigation process was probably illegal and giving senior officers influence, without any legal basis, over the decision to prosecute was almost certainly illegal.

10.25 The soldiers were further shielded by a reduction in the powers of the coroner. Inquests could have played an important role in ensuring effective investigations but the role of the coroner was reduced, limiting the coroner's powers to influence investigations. Another factor that may have reduced the number of soldiers convicted of serious crimes was the use by the British government of Public Inquires to investigate incidents rather than using the justice system.

10.26 The conclusion is that successive British governments used the ordinary criminal law to bring soldiers suspected of crimes to justice, but behind the scenes manipulated the investigation and prosecution process in order to shield the soldiers from being brought to account. In doing so successive British governments displayed a desire to maintain the perception of legality while showing disregard for the rule of law behind closed doors. Again, the implication is that successive British governments were not constrained by the law. In addition, there is some evidence to suggest that the average soldier knew that the chances of being found guilty of any alleged serious offences were slim. It therefore seems reasonable to assume that as a consequence the control function of the law on individual soldiers was undermined.

10.27 The overall picture is disappointing. The constraints imposed on the British government by the courts, domestic and international, and by Parliament were limited. With no effective opposition, successive British government set about taking advantage of every legal mechanisms and device available to it in order to limit the reach of law on its activities. These included exploiting any jurisdictional uncertainties that existed, using mechanisms that restrict Parliamentary oversight, and using discretionary powers to shield members of the Security Forces from prosecution. It also included the use, or over use, of public inquiries. The suggestion being that public inquiries sidestep the justice system and those

responsible for abuses avoid being held to account. Successive British governments also relied heavily on covert investigations. The level of secrecy involved in these investigations means that allegations of abuse against covert operatives are more difficult to prove in court and a heavy reliance on covert operations is a well-known device to limit the reach of law. In addition, successive British governments implemented emergency and anti-terrorism legislation giving sweeping powers to the Security Forces and drafted the legislation in vague terms making it difficult to pursue allegations of abuse through the courts. It is unsurprising that 'legal scholars tend to see the law as permissive rather that restrictive in this period'.[1222]

10.28 In relation to international law successive British governments used derogations and reservations to allow behaviour that would otherwise be illegal. Between 1957 and 1984 continuous derogations of Article 15 of the European Convention of Human Rights were in force.[1223] The use of derogations is entirely legitimate but the suggestion here is that the derogations were left in place when they could no longer be justified. In other words, successive British governments failed to remove the derogations when the levels of violence in Northern Ireland dropped and the argument that the violence constituted a public emergency threatening the life of the nation became untenable. At the same time, in agreeing with the British government that the IRA presented such a threat, the European Court failed to provide any real 'check' on the British government's power. In relation to the European Commission on Human Rights and the European Court of Human Rights there is also some evidence to suggest that the United Kingdom not only deliberately failed to co-operate with fact-finding attempts by those European institutions in order to shield itself from criticism, but also intentionally deceived them.[1224]

[1222] Huw Bennett, 'Smoke Without Fire'? Allegations Against the British Army in Northern Ireland' (2013) 24(2) Twentieth Century British History 275, 285.
[1223] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,* 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 11 April 2018]
[1224] Please refer to paras 9.28-9.32

10.29 In other words, there were no effective 'checks' on power and commitment to the rule of law was not always given the priority that perhaps it should have been. There are clear examples of government ministers including one Prime Minister, civil servants, senior British Army officers and soldiers on the streets of Northern Ireland displaying a clear disregard to operating within the rule of law. It is therefore perhaps not surprising the British State stands accused of creating the 'apparatus of impunity' and allowing the 'institutionalising of impunity'.[1225]

[1225] Committee on the Administration of Justice 'The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: a narrative of official limitations on post-Agreement investigative mechanisms' Committee on the Administration of Justice [CAJ 2015] 4. <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15131009/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf> accessed on 17 March 2017.

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